(23,933)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 294.

PHILLIP WAGNER, INCORPORATED, PLAINTIFF IN ERROR.

vs.

OSCAR LESER, A. B. CUNNINGHAM AND JOHN GILL, JR., JUDGES OF THE APPEAL TAX COURT OF BALTIMORE CITY, AND JACOB W. HOOK, TAX COLLECTOR OF BALTIMORE CITY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 15, 1914.

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1 MARYLAND, *sct:*

At the Court of Appeals of the said State, Begun and Held at the City of Annapolis, on the Second Monday of January (Being the Thirteenth Day of the Same Month in the Year of Our Lord One Thousand Nine Hundred and Thirteen and in the One Hundred and Thirty-seventh Year of the Independence of the United States of America.

Were present: Hon. A. Hunter Boyd, Chief Judge; Hon. John P. Briscoe, Hon. N. Charles Burke, Hon. William H. Thomas, Hon. John R. Pattison, Hon. Hammond Urner, Hon. Henry Stockbridge, Hon. Albert Constable, Associate Judges; Caleb C. Magruder, Clerk.

Among other were the following proceedings, to wit:

2 *Transcript of Record from the Circuit Court of Baltimore City in the Case of Oscar Leser, A. B. Cunningham and John Gill, Jr., Judges of the Appeal Tax Court of Baltimore City, and Jacob W. Hook, Tax Collector of Baltimore City, Appellants, vs. Philipp Wagner, Appellee, to the Court of Appeals of Maryland.*

S. S. Field, for Appellants.
John H. Richardson, Geo. Washington Williams, Niles & Wolff, for Appellee.

3 *Bill of Complaint.*

(Filed 22nd November, 1912.)

In the Circuit Court of Baltimore City.

PHILIPP WAGNER, Incorporated,
vs.
OSCAR W. LESER, A. B. CUNNINGHAM, and JOHN GILL, JR., Judges of the Appeal Tax Court of Baltimore City, and Jacob W. Hook, Tax Collector of Baltimore City.

To the Honorable, the Judge of said Court:

The Bill of Complaint of Philipp Wagner, Incorporated, a corporation formed under the General Laws of the State of Maryland, which filed this bill on its own behalf, and on behalf of all other taxpayers owning property in Baltimore City, adjoining or abutting upon any public highway which has been paved with improved paving without having been specially assessed for any part of the cost thereof, and who are similarly situated with your Orator, respectfully shows:

1. That your Orator is the owner of certain real estate in fee simple, improved by seven two-story dwelling houses, situate on the southeast side of the Philadelphia Road, a public highway within

the limits of Baltimore City, which properly abuts and *adjourns* upon said public highway, which public highway has been paved with improved paving, to wit: vitrified brick; and that said property, its former or present owner, have never at any time been specially assessed for any part of the cost of said improved paving. And that the said property is particularly described as the fourth lot in a deed from Mary Wagner, et al., to the said Philipp Wagner, Incorporated, dated April 28, 1911, and recorded in Liber S. C. L. No. 2657, folio 519, etc., one of the Land Records of Baltimore City, as will appear by a certified copy of said deed filed herewith and made a part hereof and marked Plaintiff's Exhibit No. 1.

2. That by Chapter 688 of the Acts of 1912, of the General Assembly of Maryland, it is provided and enacted as follows:

An Act levying a special paving tax upon property in Baltimore City specially benefited by improved paving, the proceeds of said tax to go into or augment the new paving fund provided by the Act of 1906, Chapter 401, and the Act of 1908, Chapter 202, and to be spent by the paving commission provided for by said acts, and to authorize the Appeal Tax Court and the City Collector to perform certain duties relating to said special tax.

SECTION 1. Be it enacted by the General Assembly of Maryland, That there is hereby levied and imposed upon property in the City of Baltimore specially benefited by improved paving (said property being hereinbelow specified), a special tax of the amount hereinbelow specified, said tax to continue as to each property for ten years from the time it attaches thereto, and the entire proceeds thereof to be used for improved paving in Baltimore City, as hereinbelow provided.

SECTION 2. Classification.—Be it further enacted, That for the purposes of this act all landed property in Baltimore City adjoining or abutting upon any public highway which has been or shall hereafter be paved with improved paving without special assessment of any part of the cost upon the abutting or adjoining property owners; by the City of Baltimore or the State Roads Commission, or other public commission or agency, or by said city and such commission or agency, or by either or both, and any railroad or railway company occupying with tracks a portion of such highway; is hereby declared to be specially benefited by such improved paving to an extent greater than the entire amount of the special tax hereby levied thereon. Said property so benefited is hereby divided into three classes, to be designated as Classes A, B and C.

Class A shall include all such landed property in the City of Baltimore adjoining or abutting upon a public highway paved with improved paving and having a width of not less than thirty feet so paved.

Class B shall include all such landed property in the City of Baltimore adjoining or abutting upon any public highway paved with improved paving and having a width of less than thirty feet and not less than fifteen feet so paved.

Class C shall include such landed property in the City of Baltimore adjoining or abutting upon any public highway

paved with improved paving and having a width of less than fifteen feet so paved.

The Appeal Tax Court of Baltimore is hereby authorized and directed to proceed forthwith to classify and list for taxes as provided by this Act for the year 1913 all landed property in the City of Baltimore which on the first day of November, 1912, was in the situation to come under the requirements of either of said classes; and thereafter on the first day of November of every year, and as soon thereafter as may conveniently be done, they shall add to said lists all landed property which during the preceding year shall have come under either of said classes. The said Court may classify property under this Act as soon as it meets the requirements thereof, but the special paving tax thereon shall not attach until the year following such classification.

Before classifying and listing any property under the special tax hereby provided, the said Appeal Tax Court shall give notice to the owner of the said property, designating a certain time when said owner may appear before said Court and be heard in reference to the liability of said property for said tax, and the class to which it properly belongs. All the provisions of existing laws relating to notice to be given by the Appeal Tax Court before changing the classification of property under the Act of 1908, Chapter 286, and to appeals from the actions of the Appeal Tax Court thereunder, shall be applicable to the notice to be given by the Appeal Tax Court and to the right of appeal from their actions under this Act. After having given such owner reasonable notice and opportunity to be heard, as herein provided, the Appeal Tax Court shall proceed to make the classification as herein provided, and shall certify their actions, in making classifications of property for the special tax provided by this Act, to the City Collector in the same manner as in cases of classification of real and leasehold property in the annex for the different rates of taxation as provided under the Act relating thereto; and the said City Collector shall add said special tax to the tax bills of the property as a separate item, to be called 'Special Paving Tax,' and shall collect the same in the same manner as ordinary taxes and real estate are collected. All the provisions of existing laws and ordinances and any amendment or amendments thereto,
6 relating to the lien of, discounts, interest and penalty or other charges upon the ordinary taxes on real estate, and the powers and duties of the City Collector in regard to the collecting, keeping accounts of, accounting for, and depositing such taxes, shall apply to the special tax herein provided for, except where inconsistent with some provisions of this Act. On the first day of every month, or next legal day, if the first is Sunday or a Holiday, the City Collector shall account for and pay over to the Comptroller, to be by him deposited with the City Register and to be placed to the credit of a new paving fund provided in the Acts of 1906, Chapter 40, and 1908, Chapter 202, and to be exclusively applicable to the cost of the work authorized by said Acts or by any amendment or amendments thereof, all the proceeds of the special tax herein levied which he shall have collected during the preceding month.

SEC. 3. Definitions: Be it further enacted, That 'Improved Paving,' as used in this Act, shall mean any substantial, smooth paving above the grade of ordinary macadam, and shall include granite or belgian blocks, vitrified brick or blocks, wood blocks, asphalt or concrete blocks, sheet asphalt, bitulithic, bituminous macadam and bituminous concrete; 'Paved' shall include repaved as to any public highway not heretofore paved with improved paving; and 'Landed Property' shall mean real estate, whether in fee simple or leasehold, and whether improved or unimproved.

SEC. 4. Be it further enacted, That the amount of the special tax hereby levied shall be as follows: On all property embraced in Class A, fifteen cents (15c.) per year per front foot or lineal foot adjoining or abutting upon the public highway. On all property embraced in Class B, ten cents (10c.) per year per front foot or lineal foot adjoining or abutting upon the public highway. On all property in Class C, five cents (5c.) per year per front foot or lineal foot adjoining or abutting upon the public highway, provided, however, that in the case of any corner property or property used only as a private dwelling adjoining or abutting upon two public highways, one in front and the other on the side, two-thirds of the number of lineal feet of said property abutting on the highway on the side shall be exempt from any tax under this Act. As to all corner property, other than private dwellings one-half of the number of lineal feet of said property abutting on the highway on the side shall be exempt from any tax under this Act.

(Approved April 11, 1912.)

7 3. That under and by virtue of the provisions of said Act, Chapter 688 of the Acts of 1912, the General Assembly has attempted to levy and impose upon the said property of the said plaintiff, and all other property owners and taxpayers, similarly situated and conditioned, to wit: All landed property in Baltimore City adjoining or abutting on any public highway which has been or may be hereafter paved with improved paving without special assessment of any part of the cost upon said abutting or adjoining property owners, by the City of Baltimore or the State Roads Commission, or other public commission or agency, or by said city, and such commission or agency, or by either or both, and any railroad or railway company, occupying with tracks a portion of such highway, said property so situated is by said Act "declared to be specially benefited by such improved paving to an extent greater than the entire amount of the special paving tax thereby attempted to be levied"; that said property so alleged to be benefited is by said Act divided into three classes, to be designated as Classes "A," "B" and "C," which classes being more specifically described therein as follows:

"Class A shall include all such landed property in the City of Baltimore adjoining or abutting upon a public highway paved with improved paving and having a width of not less than thirty feet so paved.

"Class B shall include all such landed property in the City of Baltimore adjoining or abutting upon any public highway paved

with improved paving and having a width of less than thirty feet and not less than fifteen feet so paved.

"Class C shall include all such landed property in the City of Baltimore adjoining or abutting upon any public highway paved with improved paving and having a width of less than fifteen feet so paved"; "a special paving tax of the amount" following: (Section 4. Be it enacted, That the amount of the special paving tax hereby levied shall be as follows:) On all property embraced in Class A, fifteen cents (15c.) per year per front foot or lineal foot adjoining or abutting upon the public highway. On all property embraced in Class B, ten cents (10c.) per year per front or lineal foot adjoining or abutting upon the public highway. On all property embraced in Class C, five cents (5c.) per year per front or lineal foot adjoining or abutting upon the public highway. Provided, however, that in the case of any corner property or property used only as a private dwelling adjoining or abutting upon
8 two public highways, one in front and the other on the side, two-thirds of the number of lineal feet of said property abutting on the highway on the side shall be exempt from any tax under this Act. As to all corner property other than private dwellings one-half of the number of lineal feet of said property abutting on the highway on the side shall be exempt from any tax under this act," "said tax to continue as to each property for ten years from the time it attaches thereto."

4. That in conformity with said Act, to wit, Chapter 688, above set forth at length, the Appeal Tax Court of Baltimore is proceeding to and is now classifying and listing for taxes the property so attempted to be levied upon by said Act, and has classified said property above described of the said plaintiff, and designating it as belonging to Class A, and will appear from a reference to the notices sent out by the said Appeal Tax Court, which are filed herewith and marked Plaintiff's Exhibit No. 2.

5. That your Orator is advised that the said Act of 1912, Chapter 688, hereinbefore set forth at length, is illegal and void as being in conflict with the Fifth and Fourteenth Articles of the Amendments to the Constitution of the United States, as well as being in conflict with the Fifteenth Article of the Maryland Bill of Rights; that it is of the utmost moment and importance to the people of the whole of Baltimore City, and especially of high and grave moment to the residents and property owners coming within the provisions and conditions of the said Act, to wit, Chapter 688 of the Acts of 1912, that this Honorable Court should forthwith construe the rights of your Orator and of those situated analogously with it in the premises, and that this Court should forthwith adjudicate, determine and decree whether the said property of your Orator is liable to be subjected to the special paving tax as provided in the said Chapter 688 of the Acts of 1912, which said property is now being classified and listed, and which has already been levied upon by the said Act, Chapter 688, so far as it can be legally considered to do so, together with other property similarly situated with it, and that this said

Act of 1912, Chapter 688, should be declared by this Honorable Court invalid and unconstitutional.

That accordingly it is proper and necessary both for the administrative purposes of the departments which are designated to carry out the provisions and purposes thereof, and for the due advantage of the people affected thereby, as well as the due adjustment and determination of the rights of your Orator and of those
9 taxpayers in the same plight with it, that this Honorable Court should immediately adjudicate and decide the questions presented herein, inasmuch as the levy is already made by said Act, Chapter 688, and the classification and listing for the next ensuing year after the attaching of the said Act to said property, to wit, the year 1913, by the Appeal Tax Court of Baltimore City is now being made, and is required by said Act to be made during the month of November, 1912, or as soon thereafter as conveniently can be done, a day which will have arrived and passed before the rights, of your Orator and other taxpayers as asserted herein will have been ultimately determined by the Court of Appeals of Maryland; and your Orator further shows that unless the said Appeal Tax Court of Baltimore is restrained from listing and classifying the said property of your Orator and other property similarly situated with it for the purpose mentioned in said Act, and further to that the said Jacob W. Hook, the Tax Collector for Baltimore City, be restrained from collecting the said tax provided in and levied by the said Act of 1912, Chapter 688, from it, out of or from said property, above described, and other property similarly situated and owners plighted, your Orator and other taxpayers similarly situated with it, will be subjected to great and irreparable loss and damage, and will also be subjected to great hardship and oppression at the hands of the defendants as their constitutional rights will be invaded and impaired, and that without the intervention and protection of a Court of equity, in the premises your Orator would be without remedy inasmuch as it would not be able to obtain adequate relief in a Court of law.

6. That your Orator further states that it is entirely remediless in a Court of law to prevent the illegal action which the said Appeal Tax Court, and the Tax Collector of Baltimore, Jacob W. Hook, are about to take in the premises, under said void and unconstitutional Act of the General Assembly of Maryland, to wit, Chapter 688 of the Acts of 1912, and that whilst an appeal is afforded by the local law, which is referred to in said Act and made applicable thereto, from illegal assessments, to the Baltimore City Court, there is no appeal and there could not be any from an illegal levy, the levy being made not by the Appeal Tax Court of Baltimore City, but by the General Assembly of Maryland, and your Orator is therefore advised that there is no right of appeal whatever to the Baltimore City Court from the levy which the said General Assembly of Maryland has made under and by said Chapter 688 of the
10 Acts of 1912, in disregard of the above mentioned articles of the Constitution of the United States, to wit, the Fifth and

Fourteenth Amendments and the Fifteenth Article of the Maryland Bill of Rights.

7. That furthermore the jurisdiction and interposition of a Court of equity are absolutely necessary in the case to avoid a multiplicity of suits which would be the result of the adoption, classification, listing and enforcement of the levy made by the General Assembly of Maryland aforesaid, by the Appeal Tax Court of Baltimore and the said Tax Collector, Jacob W. Hook, and would aggregate thousands of cases as your Orator is informed and would be productive of great expense amounting to many thousands of dollars to the parties in interest, and no remedy in law, either by action for damages or otherwise, would be sufficient to relieve your Orator and other- similarly situated from the irreparable damage that would be sustained by it and them if the defendants are allowed to proceed in the manner in which they propose to do with reference to said levy and classification and its enforcement thereof, and your Orator shows that it has the right upon its own behalf and the behalf of those in the same plight with it, under the law, to have a declaratory decree passed by this Honorable Court, construing said Chapter 688 of the Acts of 1912, and determining its validity.

To the end, therefore—

1. That the rights and obligations of your Orator and of all other owners of property within the description of the said act of the General Assembly of Maryland, to wit, Chapter 688 of the Acts of 1912, may be adjudicated and ascertained, and that it may be decreed that your Orator and said other owners of property within the description and provisions of the said act, hereinbefore set out in full, and similarly situated with it, shall not be liable to pay the special paving tax for the purposes in said act specified and provided.

2. That Chapter 688 of the Acts of 1912 aforesaid, may be construed by this Honorable Court, and that the same may be declared to be an invalid and unconstitutional exercise of legislative power upon the part of the General Assembly of Maryland, as being in conflict with both the Maryland Bill of Rights and the Constitution of the United States.

3. That a permanent injunction and preliminary injunction shall issue against the said Appeal Tax Court, strictly prohibiting
11 it from classifying and listing for taxes and from causing or requiring to be issued any tax bill or tax bills against your Orator, as the owner of said property hereinbefore described, as provided by the said Chapter 688 of the Acts of 1912, and also against the said Jacob W. Hook, Tax Collector for Baltimore, prohibiting him from refusing to accept a tender from your Orator of the amount of taxes really and lawfully due by your Orator as the owner of said property under the General Levy, and from refusing to give to your Orator a full and complete receipt and acquittance for the taxes upon said property, upon the tender and payment of your Orator of the amount of taxes about to become really and lawfully due by it as aforesaid, to said Jacob W. Hook, the Tax Collector of Baltimore City, and to restrain him, the said Jacob W. Hook, Tax Collector, from attempting to collect any taxes under said Act, to

wit, Chapter 688 of the Acts of 1912, or to enforce the provisions thereof against your Orator in any way whatever.

4. That your Orator may have such other and further relief as the exigencies of its case may require.

May it please your Honor, to grant unto your Orator, the writ of subpœna issued and directed to the defendants, the said Oscar Leser, A. B. Cunningham and John Gill, Jr., judges of the Appeal Tax Court of Baltimore City, and the said Jacob W. Hook, Tax Collector of Baltimore City, commanding them *and* appear in the Honorable Court on some day certain to be therein named, to answer the premises, and abide by and perform such decree as may be passed herein, and also to issue further the writ of injunction against the said defendants in form and effect as above prayed.

And as in duty bound, etc.

(Signed) JOHN H. RICHARDSON,
GEO. WASHINGTON WILLIAMS,
Solicitors for Plaintiffs.

12 STATE OF MARYLAND,
Baltimore City, To wit:

I hereby certify, that on this 22nd day of November, in the year one thousand nine hundred and twelve, before me, the subscriber, a notary public of the State of Maryland, personally appeared William C. F. Wagner, President of the Philipp Wagner, Incorporated, and he made oath in due form of law that the matter and facts set forth in the above bill of complaint, are true as therein stated, to the best of his knowledge, information and belief.

Witness my hand and notarial seal.

(Signed) ELIZABETH RICHARDSON,
[SEAL.] *Notary Public.*

PLAINTIFF'S EXHIBIT No. 1.

(Filed 22nd Nov., 1912.)

Mary Wagner, etc., to Phillipp Wagner, Inc. Deed.

This deed made this 28th day of April, in the year one thousand nine hundred and eleven, by Mary Wagner, John C. Wagner and Caroline M. Wagner, his wife, William C. F. Wagner and Rosa Wagner, his wife, Annie S. Cosgrove and Thomas E. Cosgrove, her husband, and Amelia Horn and Jacob H. Horn, her husband, all being of Baltimore County and State of Maryland. The said Mary Wagner being the widow of Phillipp Wagner and John C. Wagner, William C. F. Wagner, Annie S. Cosgrove and Amelia Horn, being the children and only heirs at law of the said Phillipp Wagner. Witnesseth that in consideration of the sum of five dollars and other good and valuable considerations the said Mary Wagner, John C. Wagner and Caroline M. Wagner, his wife, William C. F. Wagner and Rosa Wagner, his wife, Annie S. Cosgrove and Thomas E. Cosgrove, her husband, and Amelia Horn and Jacob H. Horn, her hus-

band, do hereby grant and convey unto "Phillipp Wagner, Incorporated," a corporation under the Laws of Maryland, its successors and assigns, in fee simple, all those four lots of ground situate in City of Baltimore and State of Maryland and described as follows:

13 Beginning for the first of said lots of ground on the east side of Spring street one hundred and fifty-two feet north from the northeast corner of Lanvale and Spring streets and running thence northerly binding on the east side of Spring street twelve feet; thence east parallel with Lanvale street, seventy feet and six inches to the west side of an alley ten feet wide; thence southerly binding on the west side of said alley twelve feet, and thence westerly and parallel with Lanvale street seventy feet and six inches to the place of beginning.

Being the same lot of ground conveyed by the East Monument Permanent Building and Savings Association to the said Phillipp Wagner, in fee simple, by deed dated October 31st, 1905, and recorded in Liber R. O. No. 2185, folio 348, etc., one of the Land Records of Baltimore County.

And beginning for the second of said lots of ground on the north side of Gorsuch avenue four hundred and sixty-eight feet west from the northwest corner of Harford turnpike and Gorsuch avenue and running west on Gorsuch avenue sixteen feet; thence at right angles, northerly ninety feet to a twenty-foot alley; thence at right angles, easterly sixteen feet, and thence at right angles southerly ninety feet to the beginning.

Being the same lot of ground which by deed dated February 20th, 1905, and recorded in Liber R. O. No. 9125, folio 393, etc., one of the Land Records of Baltimore City, was conveyed by Henry Kleinschmitt and wife to the said Philipp Wagner.

And beginning for the third of said lots on the south side of the Philadelphia Road at a point where said road is intersected by the center line of Chesapeake Alley, and running thence easterly and binding on said road seventy-five feet nine inches to a stake planted on the south side of said road, which stake is at the end of a line drawn northerly along the westernmost side of the brick wall of the several improvements situate upon the lot of ground described in a lease from Jacob Pappler to Caroline Knorr dated July 17th, 1873, and recorded in Liber G. R. No. 621, folio 365, etc., thence southwardly binding on the westernmost line of the lot described in the lease above referred to one hundred and thirty-eight feet to a stake planted on the north side of Fayette street; thence westerly on the north side of Fayette Street eighty-eight feet and one inch to a stake planted in the center of Chesapeake Alley and running thence north and binding on the center of Chesapeake Alley one hundred and twenty-eight feet to a stake planted on the south side of Philadelphia Road, the place of beginning.

14 Being the same lot of ground which by deed dated February 13th, 1908, and recorded in Liber S. C. L. No. 2403, folio 142, etc., one of the Land Records of Baltimore City,

was conveyed by Ann Charlotte Pappler, et al., to the said Philipp Wagner, in fee simple.

And beginning for the fourth of said lots of ground on the south side of the Philadelphia road at the distance of one hundred and thirty-five feet easterly from the center of Chesapeake alley, which place of beginning is at the end of the third and beginning at the fourth line of the description in a conveyance from Samuel Snowden, trustee, to said Charles Spitznagle, which said conveyance *be as* date- September 14th, 1875, and recorded among the Land Records of Baltimore City in Liber G. R. No. 714, folio 159, etc., and running thence easterly binding on the south side of the Philadelphia road to the easternmost outline of lot No. 1 on the sales plat filed in the case of Jacob Pappler vs. Samuel J. Slater, et al., duly recorded among the Chancery Records in the Circuit Court of Baltimore City in Liber J. R. B. No. 54, folio 816, etc.; thence southerly binding on said outline and parallel with Chesapeake alley to a point intersected by a line drawn easterly in the prolongation of the second line in the above mentioned conveyance from Samuel Snowden to Charles Spitznagle; thence westerly reversing the line so drawn to the end of said second and the beginning of the third line in the said conveyance, and thence northerly with said third line in said conveyance to the place of beginning.

For title see deed Justus H. Danzeglock and wife to Philipp Wagner dated February 1, 1893, and recorded in Liber J. B. No. 1429, folio 515, etc., one of the Land Records of Baltimore City.

Together with the improvements thereon and the right and appurtenances to the same belonging or in anywise appertaining.

To have and to hold the first, third and fourth lots of ground and premises unto and to the use of the said Philipp Wagner, Incorporated, its successors and assigns forever in fee simple, and to have and to hold the second described lot of ground and premises and the reversion thereto and particularly the annual rent payable out of said lot unto and to the use of the said Philipp Wagner, Incorporated, its successors and assigns, forever in fee simple, subject, however, to an outstanding leasehold interest therein.

And the said grantors hereby covenant that they will war-
15 rant specially the property hereby conveyed and that they will execute such further assurances of the same as may be required.

Witness the hands and seals of said grantors.

MARY WAGNER.—(J. C. K.)	[SEAL.]
JOHN C. WAGNER.—(J. C. K.)	[SEAL.]
CAROLINE M. WAGNER.	[SEAL.]
WILLIAM F. WAGNER.	[SEAL.]
ROSA WAGNER.	[SEAL.]
ANNIE S. COSGROVE.	[SEAL.]
THOMAS E. COSGROVE.	[SEAL.]
AMELIA HORN.—(J. C. K.)	[SEAL.]
JACOB H. HORN.—(J. C. K.)	[SEAL.]

Test—
J. CLARK KELLEY.

STATE OF MARYLAND,
Baltimore County, To wit:

I hereby certify that on this 28th day of April, in the year one thousand nine hundred and eleven, before me, the subscriber, a Notary Public of the State of Maryland in and for Baltimore County, personally appeared Mary Wagner, John C. Wagner and Caroline M. Wagner, his wife; William C. F. Wagner and Rosa Wagner, his wife; Annie S. Cosgrove and Thomas E. Cosgrove, her husband; Amelia Horn and Jacob H. Horn, her husband, and they did severally acknowledge the aforegoing Deed to be their act.
Witness my hand and notarial seal.

[SEAL.] J. CLARK KELLEY,
Notary Public.

16 Received for Record May 10th, 1911, at 3.30 o'clk. P. M. same day recorded and Exd., per
STEPHEN C. LITTLE, *Clk.*

I hereby certify that the aforegoing is a true copy taken from Liber S. C. L. No. 2657, folio 519, &c., one of the Land Records of Baltimore City.
In testimony whereof, I hereto set my hand and affix the seal of the Superior Court of Baltimore City on this the 22nd day of November, A. D. 1912.

[SEAL.] STEPHEN C. LITTLE,
Clerk of the Superior Court of Baltimore City.

PLAINTIFF'S EXHIBIT No. 2.

(Filed 22nd November, 1912.)

Consists of paving tax notices in reference to each of the properties mentioned in the bill, all in the same form, one of them being as follows:

Appeal Tax Court.

City Hall.

No. 12441.

Special Paving Tax Notice under the Provisions of Chapter 688 *of the Acts of* 1912.

BALTIMORE, Nov. 11th, 1912.

To Philip Wagner or owner of (Description of property): 2869 Phila., Rd., of which (according to our present information) 12 feet adjoin or abut on Phila. Rd., a public highway, paved with improved pavement without special assessment upon the abutting owners, and having a width of 40 feet so paved.

You are hereby notified that, between 11 A. M. and 1 P. M. on Nov. 18, 1912, next, at the rooms of the Appeal Tax Court
17 in the City Hall, you will be given the opportunity to appear before the said Court and be heard in reference to the

liability of the property above described for the special paving tax levied by the Act of 1912, Chapter 688, beginning with the year 1913, and the class to which it properly belongs.

Thereafter the Court will take action according to its best judgment and information in the premises.

For the Court,

FRANK J. MURPHY,
Chief Clerk.

☞The final action taken in pursuance of the above notice will appear by the books of the Appeal Tax Court on December 31st next.

Rates of Tax.

(Annually for Ten Years.)

On property adioining, or abutting on, streets 30 feet wide or over, 15 cents per lineal foot adioining street.

On property adjoining, or abutting on, streets or alleys less than 15 feet wide, 5 cents per lineal foot adjoining street or alley.

On property adjoining, or abutting on, streets 15 feet wide or over (but less than 30 feet wide), 10 cents per lineal foot adjoining street.

As to corner property, when used only as a private dwelling, two-thirds of the side is exempt from the tax; as to all other corner property, one-half of the side is exempt.

18 *Demurrer.*

(Filed 27th November, 1912.)

In the Circuit Court of Baltimore City.

PHILIPP WAGNER, Incorporated,
vs.
OSCAR LESER, A. B. CUNNINGHAM, and JOHN GILL, JR., Judges of the Appeal Tax Court of Baltimore City, and Jacob W. Hook, Tax Collector of Baltimore City.

To the Honorable the Judge of said Court:

The defendants demur to the whole Bill in the above entitled case and to all the relief therein prayed, and for cause of demurrer state:

1. The plaintiff has not stated in the Bill any case for relief by this Honorable Court; that, by the Act of 1912, Chapter 688, which is assailed in said Bill, the plaintiff is given the plain and adequate remedy at law by appeal to the Baltimore City Court, and by such appeal it could raise, in the City Court, not only the question of fact as to whether or not the plaintiff's property was properly classified under the Act of the Appeal Tax Court, but also the question raised

in the Bill as to the validity of the law, because the action of the Appeal Tax Court, in classifying the plaintiff's property depends entirely upon said Act, and if said Act be invalid, then the whole action of the Appeal Tax Court is null and void, and the Baltimore City Court, upon appeal, would have ample and full jurisdiction to pass upon said question.

2. That the said Act 1912, Chapter 688, is not invalid as being in violation either of the Fifth or Fourteenth Amendments
19 to the Constitution of the United States, or in conflict with any provision of the Constitution or Bill of Rights of Maryland, but is a just and equitable measure of putting upon the owners of a certain class of property, which is enjoying a special benefit at the public expense over and above the benefit enjoyed by other similar property, a very moderate and reasonable charge for the special benefit thus enjoyed.

Taking the houses of the plaintiff as an example, they are enjoying the special benefit and advantage of fronting upon a street improved with a handsome, clean and modern vitrified brick pavement, while thousands of other houses in the city abut upon old, unhealthy and unsightly cobblestone streets, and for this especial advantage to the houses of the plaintiff the Act in question puts a special charge upon each of said houses of the very small sum of $1.80 per year, or $18.00 for each of said houses for the whole ten years, for which, under the Act, the tax runs; that the said $18.00 is the entire amount which, by the Act, the plaintiff is called upon to pay on account of said special benefit more than the owner of a house on a cobblestone street is required to pay, and the liability to pay this trifling sum of $1.80 per house for one year at the most is the irreparable damages which the plaintiff says it will suffer and for relief from which it invokes the protection of the Bill of Rights and the Constitution of the State and the Fifth and Fourteenth Amendments to the Constitution of the United States; that it is only just and fair that the plaintiff, enjoying a special benefit, should be subjected to a reasonable special charge; that the charges in the Act are reasonable and the Act is valid and sustainable upon the same principle upon which Acts to make special assessments upon abutting owners for the cost of paving a street, and the Act making a discrimination in the tax rate in the Annex, based upon the physical condition of the streets adjoining and surrounding the property, have been sustained

3. The bill does not state any case for equitable jurisdiction on the ground of avoiding a multiplicity of suits, for, while it is possible that every property holder affected might, if he chose to do so, take an appeal to the City Court, and, therefore, there is a possibility of a multiplicity of appeals, it is not at all probable that there will be many appeals, because the amount involved as to any one house for one year is only a trifling sum of a few dollars, or, to be exact, $1.80 on houses similar to the plaintiff's; and if the owner paid that trifling sum for one year—during which time the question would cer-
20 tainly be decided—it would cost him a very small part of what it would cost him to take an appeal. Moreover, under the law, this charge goes on the tax bill as a separate item, and the

owners of property may, if they choose to do so, pay their ordinary taxes and defer paying this special item until after some one appeal might have been taken and decided by the City Court and by the Court of Appeals. No embarrassment would be caused to the city administration by any delay in the payment of the special paving tax, as the entire proceeds of that tax go not into the City Treasury, but into the special paving fund created by the $5,000,000 Loan Act, which fund is ample for several years yet to come, and, therefore, it makes absolutely no difference to the city administration or to the Paving Commission whether the paving tax levied for 1913 is paid in 1913 or in 1914. In addition to this, there is just as much probability of every property holder filing a bill of equity, if that remedy is proper, as there is of every property holder appealing to the City Court. Therefore, there is no reason that this Court should entertain jurisdiction upon the supposition that, thereby, a multiplicity of suits might be avoided.

4. That the bill does not show any case for the jurisdiction of this Court under the sections of the Code giving this Court power to pass a declaratory decree, because those sections do not give this Court power to pass declaratory decree where there is an adequate remedy at law, and the case is not, in its nature, one of equity cognizance.

Respectfully,

S. S. FIELD,
Solicitor for Defendants.

STATE OF MARYLAND,
City of Baltimore, To wit:

I hereby certify that before the undersigned, a notary public of the State of Maryland, in and for the City aforesaid, personally appeared Oscar Leser, one of the defendants, and made oath,
21 in due form of law, that the above demurrer is not intended for delay.

Witness my hand and Notarial Seal this 26th November, 1912.

[SEAL.] CHAS. KREUDER, JR.,
Notary Public.

Service of copy admitted this 27th day of Nov., 1912.
GEORGE WASHINGTON WILLIAMS.

Petition.

(Filed 5th December, 1912.)

In the Circuit Court of Baltimore City.

PHILLIP WAGNER, INCORPORATED,
vs.
OSCAR LESER, A. B. CUNNINGHAM, JOHN GILL, JR., Judges of the Appeal Tax Court; JACOB W. HOOK, Tax Collector.

To the Honorable the Judge of said Court:

The petition of The Safe Deposit and Trust Company of Baltimore, trustee as hereinafter mentioned, respectively shows unto your Honor:

1. That the Bill of Complaint heretofore filed in this case was filed by the plaintiff herein "on its own behalf and on behalf of all other taxpayers owning property in Baltimore City, adjoining or abutting upon any public highway which has been paved with improved paving, without having been specially assessed for any part of the cost thereof, and who are similarly situated with" said plaintiff.

22 2. That your petitioner is a taxpayer holding on behalf of various trust estates in its hands, property in Baltimore City adjoining or abutting upon public highways which have been improved with improved paving, without having been assessed for any part of the cost thereof, and as such it has received sundry "Special Paving Tax Notices" under the provisions of Chapter 688 of the Acts of 1912; a list of the various properties for which it has received such notices being herewith filed as part hereof, and marked "Petitioner's Exhibit S. D. & T. No. 1."

3. That upon each of the pieces of property mentioned in said exhibit, the General Assembly of Maryland, by the Act of 1912, Chapter 688, attempted to levy and impose a special paving tax as in said act (which is set forth in full in the bill heretofore filed in this case), is provided, and the judges of the Appeal Tax Court of Baltimore, defendants herein, are now proceeding to classify and list for taxing, said property, preparatory to certifying their said actions to the City Collector, in order that he may add the special tax provided by the said act to the tax bills of the said property and collect the same, as is provided by said act.

4. That this petitioner is advised that the said Act of 1912 Chapter 688, attempts to levy a tax which is neither according to the value of the property which is subject to it, nor to be used to pay for improvements specially benefiting the property levied upon, and not even for the general purposes of City government, but is appropriated to the payment for improvements specially benefiting other property; that there is no limitation of the amount collected under this Act to the amount spent by either City or State, for the improved pavement, on account of which the tax is collected, that no matter under what provisions of law the improved pavement was laid down and the cost thereof defrayed, and no matter for how many years all taxes levied against the property may have been paid by the owners, and no matter how often the property may have changed hands since the pavement was laid, the tax upon the abutting property is fixed at the same rate, provided only that this cost has not been heretofore met, in whole or in part, by special assessment upon the abutting property; that in short the whole scheme of the tax is not to assess upon certain property the whole or a part of the expense of an improvement from which that
23 property derives special benefit, but to collect from the owners of property supposed to have in the past derived special benefit from City and State improvements, a part of the value of those benefits, which when collected, shall be spent for the benefit of other property, and to collect this not in proportion to the value of the property, but according to the front foot rule.

5. This petitioner is advised that the said Act of 1912, Chapter

688, is in conflict with the 14th Amendment of the Federal Constitution, inasmuch as it attempts to take the property of this petitioner, and others similar situated, without due process of law.

6. Your petitioner is also advised that the said Act of 1912, Chapter 688, is in conflict with the provisions of the 15th and 23rd Articles of the Maryland Declaration of Rights.

7. That included in the property mentioned in said schedule heretofore filed and marked "Petitioner's Exhibit S. D. & T. No. 1," are certain pieces of property abutting upon improved pavement recently laid, and other pieces abutting on improved pavement laid many years ago and now worn out and valueless; there are certain pieces of property abutting upon pavement laid since the title to said property has been in your petitioner or in those from whom it received it without valuable consideration, and certain other pieces of property abutting upon pavement which was laid while the title to said property was held by those from whom your petitioner, or its predecessors in title, purchased it for valuable consideration; there are certain pieces of property abutting upon improved pavement paid for by the city out of the general levy, and certain pieces of property abutting upon improved pavement paid for by the State.

8. Your petitioner therefore prays your Honor that it may be allowed to become a plaintiff in this case and adopt the allegations contained in the bill heretofore filed, together with the allegation of this petition, as fully as if the said bill were again set forth verbatim herein.

And as, etc.

SAFE DEPOSIT & TRUST COMPANY
OF BALTIMORE, *Trustee,*
By JNO. W. PEARSHALL,
2nd Vice-President.

WM. R. HUBNER,
Ass't Secretary.

24 STATE OF MARYLAND,
Baltimore City, To wit:

I hereby certify that on this third day of December, 1912, before me, the subscriber, a notary public of the State of Maryland, residing in Baltimore City aforesaid, personally appeared William R. Hubner, the assistant secretary of the Safe Deposit and Trust Company of Baltimore, and made oath in due form of law that the matters and facts set forth in the above petition are true as therein stated to the best of his knowledge, information and belief.

Witness my hand and notarial seal.

[SEAL.] GEORGE B. GAMMIE,
Notary Public.

Ordered by the Circuit Court of Baltimore City, this third day of December, nineteen hundred and twelve, upon the foregoing petition and affidavit, that the Safe Deposit and Trust Company of

Baltimore be and it hereby is admitted as a party plaintiff to this case, as in said petition prayed.

CARROLL P. BOND.

PETITIONERS' EXHIBIT S. D. & T. No. 1.

(Filed 5th December, 1912.)

List of "Special Paving Tax Notices" under provisions of Chapter 688 of the Acts of 1912, received by the Safe Deposit and Trust Company of Baltimore on account of the various properties held by it in Baltimore City for various trust estates in its hands, of the form following:

No. 1491 Argyle Ave.
No. 215 E. Baltimore St.
Nos. 391 to 309 E. Baltimore St.
No. 428 E. Baltimore St.
25 Nos. 800 to 802 E. Baltimore St.
No. 828 E. Baltimore St.
No. 103 W. Baltimore St.
No. 126 W. Baltimore St.
Bank Lane (16 N. Charles St.).
Bank Lane (S. E. Cor. Hanover & Fayette Sts.).
No. 1218 Bolton St.
No. 1103 Bond St.
No. 1018 Bond St.
Nos. 2315–25 Boston St.
Broadway (1649 E. North Ave.).
No. 1018 N. Calvert St.
No. 1117 N. Calvert St.
No. 1120 N. Calvert St.
No. 1120 N. Calvert St.
No. 1122 N. Calvert St.
No. 1122 N. Calvert St.
No. 1819 N. Calvert St.
No. 1821 N. Calvert Street.
No. 8 & 10 S. Calvert Street.
No. 34 S. Calvert St.
Nos. 124–6 S. Calvert St.
No. 201 W. Camden St.
No. 209 W. Camden St.
No. 209½ W. Camden St.
No. 408 Cathedral St.
No. 518 Cathedral St.
No. 810 Cathedral St.
Canton Ave. (854 Frederick Ave.).
26 No. 100 Centre Market Space.
No. 102 Centre Market Space.
No. 13 N. Charles St.
No. 16 N. Charles St.

No. 311 N. Charles St.
No. 2334 N. Charles St.
No. 2200 N. Charles St.
No. 13 E. Eager St.
Nos. 819–21 Ensor St.
No. 411 Exchange Place.
No. 307 E. Fayette St.
Nos. 104–6 E. Fayette St.
Nos. 107–11 W. Fayette St.
No. 123 W. Fayette St.
No. 408 Forrest St.
No. 412 Forrest St.
No. 104 N. Fremont St.
Fremont St. (701 McHenry St.).
Front St. (800–02 E. Baltimore St.).
Garrett St. (318–20 W. Baltimore St.).
Garrett St. (10–12 N. Howard St.).
No. 1312 N. Gay St.
No. 1500 N. Gay St.
No. 1508 N. Gay St.
No. 1514 N. Gay St.
No. 1524 N. Gay St.
No. 1526 N. Gay St.
No. 1815 N. Gay St.
No. 1001 N. Gay St.
27 Nos. 666–72 W. German St.
No. 610 N. Gilmore St.
Grant St. (8–10 S. Calvert St.).
Gorsuch Ave. (298 Harford Ave.).
No. 26 Hanover St.
No. 28 Hanover St.
No. 6 N. Hanover St.
S. E. corner Hanover & Fayette Sts.
No. 249 W. Hoffman St.
No. 261 W. Hoffman St.
No. 301 W. Hoffman St.
No. 298 Harford Road.
No. 117 W. Lafayette Ave.
No. 1598 W. Lafayette Ave.
Lafayette Ave. (1401 Argyle Ave.).
Lafayette Ave. (1400 McCulloh St.).
No. 304 W. Lanvale St.
Lawson St. (115 W. Baltimore St.).
No. 216 E. Lexington St.
No. 11 W. Lexington St.
No. 12 W. Lexington St.
No. 529 W. Lexington St.
No. 1220 Linden Ave.
No. 8 E. Lombard St.
No. 16 E. Lombard St.
No. 14 E. Lombard St.

No. 17 E. Lombard St.
No. 707 E. Lombard St.
Nos. 109–11 W. Lombard St.
28 Lombard St. (100 Centre Market Space).
No. 1204 McCulloh St.
Madison St. (718 N. Charles St.).
Mason Alley (249 W. Hoffman St.).
No. 1522 Mt. Royal Ave.
Morton St. (1026 N. Charles St.).
Napoleon Alley (407 W. Baltimore St.—½ interest).
Napoleon Alley (415 W. Baltimore St.).
No. 1505 E. North Ave.
No. 1647 E. North Ave.
No. 1649 E. North Ave.
No. 7 W. North Ave.
No. 1901 Orleans St.
No. 137 W. Ostend St.
Paca St. (434–6 W. Pratt St.).
No. 514 Pennsylvania Ave.
No. 1210 Pennsylvania Ave.
No. 1310 Pennsylvania Ave.
No. 1801 Pennsylvania Ave.
No. 600 E. Pratt St.
No. 602 E. Pratt St.
Nos. 434–6 W. Pratt St.
No. 139 W. Preston St.
No. 225 W. Preston St.
No. 229 W. Preston St.
No. 245 W. Preston St.
No. 412 St. Paul St.
No. 414 St. Paul St.
No. 703 St. Paul St.
29 No. 804 St. Paul St.
No. 810 St. Paul St.
No. 1018 St. Paul St.
No. 1109 St. Paul St.
No. 1125 St. Paul St.
No. 1653 St. Paul St.
S. W. Corner Sharp and Camden Sts. (201 W. Camden St.)
Little Sharp St. (123 W. Fayette St.)
Nos. 1-7 South St.
No. 108 South St.
S. W. Corner Twenty-fourth and Charles Sts. (2334 N. Charles St.)
Water Alley (14 E. Lombard St.)
Twenty-second St. (2200 N. Charles St.)
No. 2450 York Road.

Answer.

(Filed 9th December, 1912.)

In the Circuit Court of Baltimore iCty.

52/360.

PHILIP WAGNER, INCORPORATED,
vs.
OSCAR LESER et al.

To the Honorable the Judge of said Court:

The defendants for answer to the petition of the Safe Deposit and Trust Company of Baltimore, filed in the above entitled case, say:

1. They admit the allegations of the first and second paragraphs of said petition.

2. Answering the third paragraph of said petition, they say that by the Act of 1912, Chapter 688, there was imposed a special paving tax upon all property abutting upon public highways paved with improved paving without having been charged with any part of the cost thereof; that the said act provides different rates of said tax corresponding to the different widths of the streets so paved, the tax being five cents per front feet upon property abutting upon improved highways less than fifteen feet wide; ten cents per front feet upon property abutting upon improved highways of not less than fifteen feet and less than thirty feet wide, and fifteen cents per front feet upon such properties on a street of not less than thirty feet wide. That the Act directed all property subject to it to be divided into three classes by the Appeal Tax Court, and that the tax shall begin from the first of January following such classification, and shall run for ten years from the time it begins as to each property; and the Judges of the Appeal Tax Court are proceeding in pursuance of said Act to classify the property as therein directed.

3. Answering the fourth paragraph of said petition, these defendants say that the Act of 1912, Chapter 688, is the part of a comprehensive scheme to convert several hundred miles of cobble-stone paving in the City of Baltimore into improved paving; that it levies a tax, the entire proceeds of which go to augment the paving loan fund to carry out said comprehensive scheme. That the entire proceeds of the tax are to be used for improved paving; that it operates only on property which enjoys the benefit of abutting upon improved streets paved with improved paving, and so long as the owner of said property enjoys that benefit it makes no difference to him whether the tax he pays to the general fund is spent on his particular street or on some other street. That the amount of such special tax is specifically stated and limited in the Act and is less against each and every property of the petitioner than would be the proportionate share of such property of an assessment of the cost of the im-

provements on that particular street upon the abutting property owner; that it is immaterial whether the improved paving has been laid recently or some years ago, so long as it is now an improved pavement, because the property enjoys the present benefit of abutting upon an improved pavement, and it will continue to enjoy
31 that benefit because the obligation rests by law upon the City to maintain the pavement as an improved pavement. That the fact that the owner of such property may have paid all of the taxes levied thereon, is immaterial, because the owners of property abutting upon cobble-stone streets who do not enjoy the advantage of abutting upon improved streets have also paid all the taxes on their property.

That it is true that the tax is not laid in proportion to the value of the property, but according to the front foot rule; but such a method of apportionment is valid and fair.

4. Answering the Fifth and Sixth paragraphs of said petition, the defendants say that the Fourteenth Amendment to the Federal Constitution, and the Fifteenth and Twenty-third Articles of the Maryland Declaration of Rights have no application to such a tax as is levied by the Act in question.

5. That these defendants deny that any of the properties of the petitioner abut upon improved paving laid many years ago and now worn out and valueless. These defendants have no knowledge as to whether or not the petitioner has acquired title to some of the properties affected since the pavement was laid upon which this property abuts, but they say that is immaterial, and it is also immaterial whether the pavement was laid by the city out of the general levy or out of a loan, or by the State Roads Commission, so long as no part of the expense was charged upon the abutting owner.

That streets in the city paved by the city from the proceeds of loans are paid for by the taxpayers just as fully as if paid from the proceeds of the tax levy, and streets paved by the State Roads Commission cost the taxpayers of the city more than if they were paved by the city, since the taxpayers of the city pay a much larger proportion of the State Roads loan than is spent in the city.

6. These defendants have no objection to the Safe Deposit and Trust Company of Baltimore becoming a party to the Bill in this case, but they say it must stand upon the Bill as filed, or as it may be amended by leave of this Honorable Court, and cannot add any allegations to said Bill simply by filing a petition.

And having fully answered, etc.

S. S. FIELD,
City Solicitor, Solicitor for Defendants.

32 Service of copy admitted this 9th day of December, 1912.

NILES & WOLFF,
Sols. for S. D. & T. Co.

Opinion on Demurrer.

(Fd. 6th January, 1913.)

In the Circuit Court for Baltimore City.

PHILIP WAGNER, INC., et al.
vs.
OSCAR LESER and Others, Judges of the Appeal Tax Court, and JACOB W. HOOK, Tax Collector.

Upon the averments of the Bill of Complaint and of the Petition of the Safe Deposit and Trust Company, Trustee, an additional party plaintiff, it appears that the plaintiffs are owners of various pieces of real property in Baltimore City which abut upon streets paved at some time in the past with smooth surfaces; and they pray that an injunction be issued to restrain the enforcement of the Act of Assembly of 1912, Chapter 688, which lays a special tax or assessment upon properties so situated. The assessment is attacked as in contravention of Article 15 of the Declaration of Rights of the Constitution of Maryland, and of the Fourteenth Amendment of the United States Constitution, especially of its inhibition against the deprivation of property without due process of law.

The demurrer, in the first place, denies any jurisdiction in this Court to determine the questions raised, and to give the relief prayed in view of the jurisdiction given by the Act to the court of
33 law to hear and dispose of complaints of property owners. In the second place, it controverts the conclusion that the assessment provided for is unconstitutional.

The objection to the jurisdiction, I find, is not a valid one. This is not a complaint of erroneous procedure or conclusions by the Appeal Tax Court acting under the statute. It is a complaint against the assessment fixed in the Act itself, without any power in the Appeal Tax Court or in the court of law on appeal to modify or depart from it. The validity of any proceedings at all with relation to the properties of the plaintiffs is denied.

Under the decisions of the Court of Appeals, such a complaint appears to be one which this Court must entertain.

Joesting vs. Baltimore, 97 Md. 589;
Wannenwetsch vs. Baltimore, 115 Md. 446.

Coming to the question of the constitutionality of the assessment, it is necessary, first, to determine clearly the legal nature and purpose of the tax provided for.

The title of the Act states its purpose to be that of "Levying a special paving tax upon property in Baltimore City specially benefited by improved paving," the proceeds to go into and augment a fund provided by other Acts of Legislature for the paving of streets in the city. And in the body of the Act the tax or assessment is described as a special paving tax upon property specially benefited

by improved paving; that is, "all landed property in Baltimore City adjoining or abutting upon any public highway which has been or shall hereafter be paved with improved paving without special assessment of any part of the cost upon the abutting or adjoining property owners by the City of Baltimore or the State Roads Commission, or other public commission or agency, or by both." All such property is expressly declared to be benefited by such improved paving to an extent greater than the entire amount of the tax levied on them. Amounts varying with the width of the streets are fixed per front foot of abutting property.

A tax upon property, as is the one provided for here, must meet the requirements of general property taxation for the expenses of government, or it must be based upon some peculiar ground, justifying an exaction from special citizens or special properties of some contribution over and above their respective shares in contribution to the general expenses of government.

34 Obviously this is not a property tax for the general expenses of government. It is not a proportionate contribution with others of the community. And it does not meet the constitutional requirements of such a property tax. It is not based upon valuations of the properties, as required by Article 15 of the Declaration of Rights of the Maryland Constitution (Tyson vs. State, 28 Md. 577). And whereas such general property taxation is the exercise of a judicial function, necessitating, under the Fourteenth Amendment of the United States Constitution, notice and an opportunity to the property owner for a hearing on the charge before it becomes fixed, this statute itself fixes the charge upon all property coming within the given description, and leaves only the applicability of the description to the property as a possible subject of a hearing.

Ulman vs. Baltimore, 72 Md. 587;
Parsons vs. District of Columbia, 170 U. S. 45.

And the language of the statute, after all, excludes any such characterization of the tax. It disclaims any intention of levying other than a special tax grounded upon benefits accrued to the property owners by local improvements. That must be the character of the tax, I think, or it has no foundation at all.

Special assessments upon property based upon benefits from local improvements are familiar forms of public charges, and as ordinarily laid are beyond question lawful. But is this such an assessment? Is it in its relation to past improvements an assessment of that nature and purpose? The provision under consideration is a novel one; unique in the law, as far as I have found, except for a somewhat similar provision pointed out by the City Solicitor in an Act of the Maryland Legislature of 1782. To test it we shall have to recur to the principles upon which the usual special assessment has been based and justified.

There seems to have been, at an earlier time, some difference of opinion as to the place in our law of the familiar special assessment for local benefits. It was sometimes referred to the power of eminent domain, and again was described as an exercise of the police power.

Still other authorities described it as a tax. The fact is that the practice of levying such an assessment upon making a public improvement existed long before constitutions, and the time when it became usual or necessary to fit governmental activities to governmental theories (1 Page & Jones on Taxation by Assessment, sections 21–27). And, having developed without reference to
35 any classification, no great assistance is to be derived from the attempts made to classify it. All authorities now agree that it is laid in the exercise of the taxing power, in that the assessment, though special anad limited in its nature, is an exaction by the sovereign of contributions by citizens to some expenses of the government. This has always been the view of the Maryland Court of Appeals. But the exaction is of its own kind, in a class of itself alone, and wholly distinct from a property tax for general governmental expenses.

The most comprehensive definition given of it is that of 1 Page & Jones on Taxation by Assessment, section 7:

"A local assessment levied on the theory of benefits may then be defined as an enforced involuntary charge, generally in money though sometimes in the alternative in work and materials, imposed by competent political authority in order to raise funds to pay for part or all of an improvement of a public character whereby an especial local benefit has in the contemplation of the law been conferred upon certain property, in most cases, realty, but in some rare cases personalty; imposed generally upon the property, but in some cases upon the owner thereof; and imposed in the contemplation of the law in return for such especial benefits, and in an amount not exceeding such benefits and apportioned according to the amount of such special benefits."

The opinions of the Court of Appeals in this State confirm this definition.

"No burden is imposed by it upon the person on whom it operates. It is a mere requisition, that the owners of property, the value of which is enhanced by the opening of the street, shall pay for the improvement in a ratio to the benefit derived from it."

Alexander vs. Mayor and Common Council, 5 Gill, 390 and 397;
Mayor, etc., of N. Y., 11 John, 77.

It is not included within a general exemption from "taxes or any imposition whatever."

Baltimore vs. Greenmount Cemetery Co., 7 Md. 517.

It need not be confined to property within the city limits. Being a contribution not to the expenses of local government, but
36 to the cost of a specific beneficial improvement, the legislature may enact it from adjoining county property which receives the benefits.

Brooks vs. Baltimore, 48 Md. 265, 268-9.

It appears from statements in the reported cases that until recent

years the assessment in Maryland was commonly laid for an improvement made upon petition of adjoining owners.

Alexander's Case, 5 Gill, 389 (Archer, J.).
Moale's Case, 61 Md. 224.

And the improvement must be one made with a view and purpose to benefit the abutting property owners, or, otherwise, it must be paid for exclusively from the general levy of taxes.

Burns' Case, 48 Md. 198;
Hanson's Case, 61 Md. 462;
Hyattsville vs. Smith, 105 Md. 318, 324-5;
Hughes' Case, 1 G. & J. 492;
Howard's Case, 6 H. & J. 391.

It follows that the amount of assessment can not exceed the cost of the improvement, even though the benefits should exceed that cost.

1 Page & Jones on Taxation by Assessment, sec. 466, and cases cited.

Clearly, I think, the special assessment provided for under the Act of 1912 is not such as has just been described. It has no reference to the cost of the improvements made near the properties charged. Improvements of all kinds made on an indefinite number of streets, at various indefinite times in the past, and lumped together as a basis of a common charge, irrespective of differences in cost.

It is not sought to return the expenditures for the several benefiting improvements to the public treasury from which they were made; improvements by all other public agencies and from all other public funds, as well, are taken as the basis of a contribution to a present fund of the city. And, lastly, it is not at all an exaction to defray the cost of the old improvements, for according to the terms of the Act, those were paid for by a general levy, and the transactions thus closed. On the contrary the whole purpose of this provision
37 of the Statute is to raise a fund for present uses, alien to these properties altogether—except as they may share in a benefit common to the whole city. The mere fact that some part of their values may have accrued to them in the past from public expenditures near by, does not, upon any theory I have been able to devise, permit laying upon them separate, special contributions for the city's present paving fund, or for any contribution other than that of the general property tax based upon their values. As has been seen, it does not meet the requirements of a general property tax. Thus the conclusion must be that the provision of the Act for assessments upon property abutting on old improvements, is in violation of the 15th Article of the Declaration of Rights of the Maryland Constitution, as charged in the bill of complaint.

"Had the respondents been originally assessed for benefit conferred under a proper law it might then be said that the assessment was for a public use, and not for a subsisting debt, and such an assessment could have been enforced. But such is not this case. And those

assessed are required, by the proceedings of the commissioners, to aid in the discharge of a debt previously contracted and to contribute money which is to be paid into a sinking fund, and to be appropriated for the payment of bonds, already issued, for the location and improvement of the park."

In the Matter of Lands in Flatbush, 60 N. Y. 398, 406.

There are other serious objections to the validity of this provision. Even if this assessment should have been clearly a special assessment to return to the City the cost of the old improvements, would it be within the power of the Legislature to make it now, in view of the decisions explaining and justifying such special taxation?

The Court of Appeals has repeatedly pointed out, that when made at the time of the improvement to defray its cost, "The legality of levying the tax does not depend upon whether the paving does or does not in fact benefit the particular district that is taxed, but upon the object, the motive of the corporation is causing the paving to be done."

Mayor, etc., vs. Hughes, 1 G. & J. 492.

And when the improvement has been made exclusively for the public benefit, no special tax may be laid. The actual levy-
38 ing of a special tax is accepted as a declaration of motive and purpose which justifies it, even when the general terms of an ordinance taken alone might have indicated a purpose to seek the public benefit exclusively.

Hughes' Case, 1 G. & J. 492;
Howard's Case, 6 H. & J. 391;
Burns' Case, 48 Md. 198;
Hanson's Case, 61 Md. 462;
Hyattsville vs. Smith, 105 Md. 318, 324-5.

Now when the City, acting as it does, as and for the State in a particular locality, has made an improvement wholly by means of general taxes, without any special assessment of benefits, must it not, conversely, be assumed that the improvement was made wholly for the public benefit? And, if this is so, can an assessment be laid at some later time, by the State, on the theory of special benefits? I think it follows that it cannot; that an assessment then would be an unfounded special charge.

The possibility that past improvements may have been made exclusively for the public benefit, is disregarded in the present Act. And this further confirms the conclusion that the charge is one for contribution to a present fund from property of an arbitrary special description.

It has been debated, in the argument, whether apart from other objections, this charge upon property once deliberately and authoritatively left free of any such charge, would not amount to a deprivation of property without due process of law, and so violate the Fourteenth Amendment to the United States Constitution. It is urged that it violates settled rights to such an extent, especially com-

ing, as it does, at a considerable time after the expenditures for the improvements have been made and closed.

Again, it has been argued that, however, the law may be with regard to those who owned the properties at the times when the improvements were made, later purchasers for value having naturally included in their purchase price the equivalent of all benefits from the improvements, would under any present retrospective assessment have to pay for benefits which do not stand to their credit distinguishing them from the general public. They would in effect pay twice for the benefits to the property.

The authorities on these points are few, and they seem to leave the questions open ones. As I have taken the view that the
39 assessment provided in the Act is not such a special assessment, even retrospectively, I shall not render any decision upon them. I think it proper to point out, however, that two of the objections urged against the tax by counsel for Philip Wagner, Inc., are in direct conflict with decisions which control this Court.

When a local assessment, as distinguished from a general property tax, is laid directly by the Legislature itself, due process of law does not require that notice and opportunity for a hearing be given the property owner before the charge is fixed.

Hager vs. Reclamation Dist., 111 U. S. 701;
Parons vs. District of Columbia, 170 U. S. 45.

And such assessments when based upon the front foot of abutting properties, without regard to differences in value, are not unconstitutional.

Johns Hopkins Hospital Case, 56 Md. 1, 31;
Alberger's Case, 64 Md. 6;
Baltimore vs. Stewart, 92 Md. 535, 552-553.

From what has been said it follows that the demurrer will be overruled. An order will be signed accordingly.

Order.

(Filed 7th January, 1913.)

In the Circuit Court of Baltimore City.

PHILIP WAGNER, Incorporated,
vs.
OSCAR W. LESER et al.

This case standing ready for hearing on demurrer filed by the defendants to the Bill of Complaint, and being submitted,
40 the proceedings were read and considered and argument of counsel heard.

It is thereupon this 7th day of January, 1913, by the Circuit Court of Baltimore City ordered that the said demurrer filed in this case be and the same is hereby overruled.

CARROLL T. BOND.

Agreement.

(Filed 7th January, 1913.)

In the Circuit Court of Baltimore City.

PHILIP WAGNER, INCORPORATED,
vs.
OSCAR LESER and Others.

It is agreed that Paragraph Seven of the Petition of the Safe Deposit and Trust Company of Baltimore, filed December 5th, 1912, with the exception of the words "and now worn out and valueless," shall, together with the schedule referred to in said paragraph, be considered a part of the Original Bill of Complaint, and be treated as if they had been inserted prior to the argument and decision of the Court.

GEO. WASHINGTON WILLIAMS,
NILES & WOLFF,
Solicitors for Plaintiff.
S. S. FIELD,
City Solicitor, Solicitor for Defendants.

41 *Order for Appeal.*

(Filed 7th January, 1913.)

In the Circuit Court of Baltimore City.

PHILIP WAGNER et al.
vs.
OSCAR LESER et al.

Mr. CLERK: Please enter an appeal on behalf of all the defendants to the Court of Appeals of Maryland from the Order and Decree passed on the 7th day of January, 1913, overruling the demurrer to the bill.

S. S. FIELD,
Solicitor for Appellants.

Appeal approved.

JAMES H. PRESTON, *Mayor.*

Which said appeal being by the Court here also granted, it is thereupon ordered by the Court here, that a Transcript of the Record of Proceedings in the cause aforesaid be transmitted to the Court of Appeals of Maryland, under the rules thereof, and the same is transmitted accordingly.

Test:

WM. M. CARSON, *Clerk.*

42 In testimony that the foregoing is truly taken from the record and proceedings of the Circuit Court of Baltimore City in the therein entitled cause,

I hereunto set my hand and affix the seal of the Circuit Court of Baltimore City aforesaid this 8th day of January, A. D. 1913.

[SEAL.] WM. M. CARSON,
Clerk of the Circuit Court of Baltimore City.

Filed January 10", 1913.

43 Court of Appeals of Maryland, January Term, 1913.

OSCAR LESER, A. B. CUNNINGHAM, and JOHN GILL, JR., Judges of the Appeal Tax Court of Baltimore City, et al.

vs.

PHILIP WAGNER.

Judge BRISCOE delivered the opinion of the court.

The decision of the questions presented on this appeal, involves the construction and validity of the Act of 1912, Chapter 688, known as "the Special Paving Tax" Act for Baltimore City.

The title of the Act, is as follows: "An Act levying a special paving tax upon property in Baltimore City specially benefited by improved paving, the proceeds of said tax to go into or augment the new paving fund provided by the Act of 1906, Chapter 401, and the Act of 1908, Chapter 202, and to be spent by the Paving Commission, provided for by said Acts, and to authorize the Appeal Tax Court and the City Collector to perform certain duties relating to said special tax."

The appellants, on the record are the Judges of the Appeal Tax Court and the Tax Collector of Baltimore City, and the appellees are The Safe Deposit and Trust Company of Baltimore, trustee, and Philip Wagner, Incorporated, holders and owners of landed property abutting upon certain public streets and highways of the City, as set out in the record now before us.

The questions to be determined arise upon a demurrer to a bill in Equity for an injunction to restrain the collection of the special paving tax, upon the ground that Chap. 688, of the Acts of 1912, imposing the tax, is invalid and unconstitutional, as in conflict with the Fifteenth and Twenty-third Articles of the Declaration of Rights of the State and, also with the Constitution of the United States.

44 The objection to the jurisdiction of the Court below to hear and determine the questions raised on the record, we think, was properly overruled.

In Joesting vs. Baltimore City, 97 Md. 590, it was distinctly held, that a Court of Equity has jurisdiction to restrain the levying of taxes, which if levied would be unlawful. The objection in this case, is against the validity of the assessment fixed in the Act itself

and a Court of Equity, had full power to entertain it, under the averments of the bill filed in the case.

Wannenwetch vs. Baltimore, 115 Md. 452;
Baltimore City vs. Starr Church, 106 Md. 281;
Baltimore vs. Gittings, 113 Md. 119.

Secondly: Is the Act of Assembly of 1912, Chap. 688, valid and constitutional? The Court below held the Act to be unconstitutional as to the assessments in this case, and from an order overruling the defendants' demurrer to the plaintiff's bill, this appeal has been taken.

By an Act of the General Assembly passed at the January session 1906, Chapter 401, amended by Chap. 202 of the Acts of 1908, provision was made for the creation of a Paving Commission for the City of Baltimore, with powers to carry out a plan or scheme for a complete system of improved pavements of the streets of the City. A fund of $5,000,000 by means of a loan, was provided for the purpose, and this loan as authorized by the Act, was submitted and approved by the people at an election held, on 2nd of May 1911. These Acts were approved by this Court in the case of Bond vs. Baltimore et al., 118 Md. 159.

The object and purpose of the Act of 1912, is to raise an additional fund of $5,000,000, to complete the plan adopted by the City for improved pavements throughout the City, and this is to be done by a special paving tax upon property in the City specially benefited by improved paving, as provided by the Act.

Section 2, of the Act provides that, on the first day of every month the City Collector shall account for and pay over to the Comptroller, to be by him deposited with the City Register and to be placed to the credit of the new paving fund provided in the Acts of 1906, Chapter 401, and 1908, Chapter 202, and to be
45 exclusively applicable to the cost of the work authorized by the Acts or by any amendment or amendments thereof.

The first section of the Act, provides that there is hereby levied and imposed upon property in the City of Baltimore, specially benefited by improved paving (said property being hereinbelow specified) a special paving tax of the amount hereinbelow specified, said tax to continue as to each property for ten years from the time it attaches thereto, and the entire proceeds thereof to be used for improved paving in Baltimore City as hereinbelow provided.

The second section of the Act, defines the property specially benefited by improved paving and upon which the tax is laid as follows, all landed property in Baltimore City adjoining or abutting upon any public highway, which has been or shall hereafter be paved with improved paving, without special assessment, of any part of the cost upon the abutting or adjoining property owners by the City of Baltimore or the State Roads Commission or other public commission or agency, or by said City and such Commission or agency or by either or both, and any railroad or railway company occupying with tracks a portion of such highway, "is hereby

declared to be specially benefited by such improved paving to an extent greater than the entire amount of the special tax hereby levied thereon."

The property made subject to the special paving tax is divided by the act into three classes, designated as Classes A. B. and C.

Class A, shall include all such landed property in the City of Baltimore adjoining or abutting upon a public highway paved with improved paving, and having a width of less than thirty feet so paved.

Class B, shall include all such landed property, adjoining or abutting upon any public highway paved with improved paving, and having a width of less than thirty feet and not less than fifteen feet so paved.

Class C, shall include all such landed property adjoining or abutting upon any public highway paved with improved paving and having a width of less than fifteen feet so paved.

46 The amount of this special tax levied by the Act, (sec. 4), on all property embraced in Class A. shall be fifteen cents per year per front foot or lineal foot, adjoining or abutting upon the public highway. On all property in Class B. ten cents per year, per front foot, and in Class C. five cents per year per front foot.

The Act also provides for a proper classification and listing of the property under the special tax and the Appeal Tax Court shall give a prior notice to the owner of the property, designating a certain time when said owner may appear before said Court, and be heard in reference to the liability of said property for said tax, and the class to which it properly belongs. All the provisions of existing laws relating to notice to be given by the Appeal Tax Court before changing the classification of property under the Act of 1908, Chapter 286, and to appeals from the actions of the Appeal Tax Court thereunder shall be applicable to the notice to be given by the Appeal Tax Court and to the right of appeal from their actions under this Act."

The Act, defines improved paving in sec. 3, as follows. "That improved paving as used in this Act shall mean any substantial smooth paving above the grade of ordinary macadam and shall include granite or belgian block, vitrified brick or blocks wood block, asphalt or concrete block, sheet asphalt, bitulithic, bituminous macadam, and bituminous concrete." "Paved" shall include repaved as to any public highway, not theretofore paved with improved paving and "Landed Property" shall mean real estate whether in fee simple or leasehold and whether improved or unimproved.

We have thus stated the material provisions of the Act somewhat at length, because we are satisfied, that when these provisions are considered in connection with its object and purpose, the objections here urged against the Act will be found to be without merit and force.

The amount of the tax it will be seen is fixed by the Act itself, and it is well settled that where the legislature fixes the amount of the tax, no notice is necessary, and in the absence of clear evidence that

the tax is arbitrary or oppressive, the legislative decision is conclusive on the Courts.
Hager vs. Dist., 111 U. S. 701;
47 Faust vs. Bldg. Asso., 84 Md. 186;
Parsons vs. District, 170 U. S. 52;
Hyattsville vs. Smith, 105 Md. 323.

The Act of 1912, however, provides that a notice shall be given to the owner of the property, to be heard in reference to the liability of the property for the tax and its proper classification. All the provisions of existing laws relating to notice and to appeals from the actions of the Appeal Tax Court, are made applicable to the notice to be given and to the right of appeal from their actions under the Act. The Act, we think, provides for ample notice.
Spencer vs. Merchant, 125 U. S. 345;
Baltimore vs. Ulman, 79 Md. 469.

The cases bearing upon the subject of a special paving tax or assessments like the one now under consideration are too numerous for us to attempt to review in this opinion. While there is some conflict among them they all will be found to rest upon the principle, there is a benefit to the abutting property by reason of the public improvement made with the public funds.

As was said, by Judge Miller, in Burns vs. Baltimore, 48 Md. 198, "The theory and foundation of all previous legislation imposing these special assessments for improvements of this character upon the owners of adjacent property is that the improvement is for their benefit, and that they derive such advantage from it in the enhanced value of their property over and above what is conferred upon the public at large, that it is just that they should be specially assessed therefor, and on this ground the validity of such laws has been sustained by the Courts."

Mr. Gray, in his work on Limitation of Taxing Power, sec. 1839, says, "While such assessments are referrable to the taxing power, they are not regarded as taxes within the meaning of constitutional provisions requiring equality and uniformity in taxation. They differ from ordinary taxes in that the citizen who pays ordinary taxes is not supposed to receive any equivalent for his taxes except the common benefits of government. On the other hand, the owner of property who pays a legal assessment receives, in theory,
48 an equivalent, in the form of an increase in the value of his property, for all he pays by way of assessments."

In Baltimore vs. Ulman, 79 Md. 482, this Court held, that where a street had been paved and the expense against the property benefited has been assessed under an Ordinance subsequently declared void, the legislature had power to authorize the City to levy special assessments against such property to the extent of the special benefits derived by the property.
Spencer vs. Merchant, 125 U. S. 365;
Baltimore vs. Ulman, 165 U. S. 719.

In Hyattsville vs. Smith, 105 Md. 318, it is said, an assessment upon abutting owners of the cost of paving a sidewalk is valid when the public benefit as well as local advantage to such owners is the object of the improvement.

The Act of 1782, Chapter 17, and Act of 1791, Chapter 59, are somewhat similar in principle to the Act of 1912, here in controversy. These Acts are referred to in Baltimore vs. John- Hopkins Hospital, 56 Md. 32 and in Baltimore City vs. Stewart, 92 Md. 552, as valid Acts, and the principles upon which these Acts rest, have never been controverted in this Court.

In City of Seattle vs. Kelleher, 195 U. S. 351, the Supreme Court, held, that the Legislature had the power to levy a special assessment on account of an improvement previously made, where at the time of the improvement an assessment had not been made. Mr. Justice Holmes in delivering the opinion of the Court, said, At the end, the benefit was there, on the ground, at the City's expense. The principles of taxation are not those of contract. A special assessment may be levied upon an executed consideration. that is to say, for a public work already done. If this were not so it might be hard to justify re-assessments. The same answer is sufficient if it be true that when the work was done the cost of planking could not be included in the special assessment. The charge of planking on the general taxes was not a contract with the landowners, and no more prevented a special assessment being authorized
49 for it later than silence of the laws at the same time as to how it should be paid for would have. In either case the legislature could do as it thought best."

Bellows vs. Weeks, 41 Vermont, 590, 599, 600;
Mills vs. Charleton, 29 Wisconsin, 400, 413;
Hall vs. Street Commissioners, 177 Mass. 434, 439;
Norwood vs. Baker, 172 U. S. 269, 293;
Williams vs. Supervisors of Albany, 122 U. S. 154;
Frederick vs. Seattle, 13 Wash. 428;
Cline vs. Seattle, 13 Wash. 444;
Bacon vs. Seattle, 15 Wash. 701;
Cooley, Taxation, 3rd Ed. 1280.

The Supreme Court, in Seattle vs. Kelleher, supra, also held, that the doctrine concerning bona fide purchasers for value did not apply to a tax of this character. A man cannot get rid of his liability to a tax by buying without notice.

Tallman vs. Janesville, 17 Wis. 71;
Cooley on Taxation, 3rd Ed. 527;
Leominster vs. Conant, 139 Mass. 384;
Parsons vs. Dist. 170 U. S. 57;
Chester vs. Pennell, 169 Pa. St. 300;
Butler vs. Toledo, 5 Ohio St. 231.

The contention that the paving tax, is void because the proceeds go into a general paving fund and not raised to pay for improvements specially benefiting the property assessed, we think, is fully

answered by the case of Jelliff vs. Newark, 48 N. J. Law, 102, and other cases cited in the appellants' brief.

We have been referred to no case where an Act, similar to the Act of 1912, Chapter 688, has been held to be void and unconstitutional. Many of the cases relied upon by the appellees relate to the validity of Ordinances authorizing the paving of streets, and not to the validity of an Act of Assembly. There is a manifest distinction between an apportionment by the Legislature and an assessment made by a municipal corporation.

Bassett vs. M. & C. C. of Ocean City, 118 Md. 121;
50 Hyattsville vs. Smith, 105 Md. 325.

The power of the Legislature to levy special taxes for local improvements, and to impose special assessments for road or street improvements, when not restricted by constitutional provisions is well settled and is supported by numerous Federal and State decisions.

In Hager vs. Reclamation Dist. 111 U. S. 705, it is said, unless restrained by the Federal Constitution the power of the State, as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction.

So without prolonging this opinion by a further discussion of the objections raised to the Act, we hold that the Act of 1912, Chapter 688, is a valid exercise of legislative power and is free from the constitutional objections urged against it. This conclusion is in accord and is supported by the principles announced by the best adjudged cases in the States and in the Supreme Court of the United States.

For the reasons stated, the order of the Circuit Court of Baltimore City dated the 7th of January, 1913, overruling the defendants' demurrer to the plaintiffs' bill will be reversed, and the petition dismissed.

Order reversed and bill dismissed with costs to the appellants.

Filed May 13th 1913.

51 Court of Appeals of Maryland, January Term, 1913.

No. 62.

OSCAR LESER et al., Judges of the Appeals Tax Court of Baltimore,
vs.
PHILIP WAGNER.

The Appeal in this case standing ready for hearing, was argued by Counsel for the respective parties, and the proceedings have since been considered by the Court.

It is thereupon, this thirteenth day of May, 1913, by the Court of Appeals of Maryland, and by the authority thereof adjudged, ordered and decreed that the decree of the Circuit Court of Baltimore City passed in the above entitled cause on the seventh day of Janu-

ary, 1913, be and the same is hereby reversed, and the petition dismissed; the appellees to pay the costs.

A. HUNTER BOYD.
JOHN P. BRISCOE.
N. CHARLES BURKE.
JNO. R. PATTISON.
HENRY STOCKBRIDGE.
HAMMOND URNER.
ALBERT CONSTABLE.

Filed May 13th, 1913.

52 Whereupon, the following judgment of the Court was entered to wit:

"1913 May 13,, Order reversed and bill dismissed, with costs to the appellants.

Opinion by Briscoe, J."

Petition for Writ of Error.

In the Court of Appeals of Maryland, January Term, 1913.

OSCAR LESER, A. B. CUNNINGHAM, and JOHN GILL, JR., Judges of the Appeal Tax Court of Baltimore City, and Jacob W. Hook, Tax Collector of Baltimore City, Appellants,

vs.

PHILIPP WAGNER, Appellee.

To the Honorable A. Hunter Boyd, Chief Judge of the Court of Appeals of Maryland:

The Philipp Wagner, Incorporated, the above named Appellee, shows that on or about the 13th day of May, 1913, the Court of Appeals of Maryland rendered a final order, judgment and decree herein reversing the judgment, decree or order of the Circuit
53 Court, filed on the 6th day of January, 1913, and dismissing the Bill of Complaint filed in this cause by Your Petitioner, the Philipp Wagner, Incorporated, in which said final judgment, order or decree, and the proceedings had prior thereto in this case, certain errors were committed to the prejudice of the Appellee, all of which will appear more fully and in detail from the Assignment of Errors, which is filed herewith, and is intended to be taken as a part hereof.

That said decision of the Court of Appeals of Maryland is a decision against the right, title and interest specially set up and claimed by the Appellee under the Federal Constitution in said Circuit Court of Baltimore, and in said Court of Appeals of Maryland, and therefore that said decision is one in favor of authority exercised under the State of Maryland against the said claim and contention of the Plaintiff in error. The said authority is repugnant to the Constitution of the United States, and especially to the first section to the fourteenth Amendment thereto.

Wherefore, the Plaintiff in error prays for a Writ of Error directed to the Court of Appeals of Maryland, the highest Court of law in Equity of the said State of Maryland, commanding that Court to send a record of the proceedings in this suit or action and all things concerning the same, duly authenticated, to the Justices of the Supreme Court of the United States, and for the usual citation to the end that the record of the proceedings being inspected the said Justices of the Supreme Court may cause further to be done
54 therein, to correct all error, what of right and according to the Law and Constitution of the United States ought to be done.

And your Petition- will ever pray, etc.

WILLIAM C. WAGNER,
President of the Philipp Wagner, Incorporated.

JOHN HOLT RICHARDSON,
GEO. WASHINGTON WILLIAMS,
Attorneys for Philipp Wagner, Inc.

STATE OF MARYLAND,
Baltimore County, To wit:

William C. Wagner, President of the Philipp Wagner, Inc., being duly sworn, says that the matter and facts set forth in the above named petition are true to the best of the deponent's knowledge, information and belief.

[NOTARIAL SEAL.] ELIZABETH RICHARDSON,
Notary Public.

Filed August 26th, 1913.

55 *Assignment of Errors.*

In the Court of Appeals of Maryland, January Term, 1913.

General Docket No. 62.

OSCAR LESER, A. B. CUNNINGHAM, and JOHN GILL, JR., Judges of the Appeal Tax Court of Baltimore City, and Jacob W. Hook, Tax Collector of Baltimore City, Appellants,

vs.

PHILIPP WAGNER, Appellee.

The Appellee, the Complainant below, in connection with its petition for a Writ of Error, makes the following Assignment of Errors, which it avers exists.

That in the record and proceedings, decision and final order and decree of the Court of Appeals of Maryland, the Court of last resort in the State of Maryland, in the said suit or action there is manifest error in this, to wit:

1. That the said Court erred in reversing the order of the Circuit Court of Baltimore City, which order overruled the demurrer filed by

the Appellants, and in dismissing the Bill of Complaint by this Appellee filed.

2. That said Court erred in refusing to sustain and affirm said ruling of the Circuit Court of Baltimore City.

3. That said Court erred in refusing to hold the Statute set forth in said Bill of Complaint, to wit, the Act of the General
56 Assembly of Maryland, of 1912, Chapter 688, invalid as being repugnant to the Federal Constitution, and particularly to the first section of the Fourteenth Amendment thereto.

4. That said Court erred in refusing to hold and declare the said Act of the General Assembly of Maryland of 1912, Chapter 688, illegal and void, because it arbitrarily imposed a fixed sum upon property holders and for special benefits alleged to have been received, without giving an opportunity to the property holder to show as a matter of fact said property is not benefited to the extent to which it is declared by the Act to be benefited, and is therefore a "Taking of property without due process of law," contrary to said Constitutional provision.

5. That said Court erred in refusing to hold and decide that when special assessments are made by the General Assembly of Maryland, the property holders affected thereby are entitled to notice, before the same shall become finally operative upon said property, and that in absence of such notice said Statute, was and is void, under the Fourteenth Amendment of the Constitution of the United States.

6. That said Court erred in holding and deciding that the front foot rule, the method of apportionment adopted by said Act, and made applicable to the City of Baltimore as a whole, was and is not, in the circumstances of the present case, arbitrary and inequitable, unjust and oppressive, and therefore not in contravention of the said fi-st section of the fourteenth Amendment of the Constitution of the United States.

7. That said Court erred in holding and deciding, that notwithstanding the fact that under the said Statute the front foot rule applies to all classes of properties without regard to the vary-
57 ing conditions affecting the same, with the exception of the width of the streets, and whether or not a Special Assessment had theretofore been levied for such improvement, the said Statute is Constitutional and valid and is not in conflict with the Federal Constitution, and particularly the fourteenth Amendment thereto.

8. That the said Court erred in refusing to hold and decide that the front foot rule when applicable to a whole City, the size of the City of Baltimore, and when the same is part of a General System of scheme of improvement of the whole of such City, has no relation to the relative benefits alleged to have been received.

9. That the said Court erred in holding and deciding that the front foot rule when applied in the circumstances covered by said Statute, is a reasonable method of apportioning the relative benefits accruing to such property as comes within the terms thereof, and that the said Statute is a Constitutional and valid exercise of the Legislative power.

10. The said Court erred in refusing to hold and decide that the

said Statute set forth in said Bill of Complaint is null and void, as being in conflict with the Federal Constitution, in that it disturbs vested right, to wit; by imposing a tax or a Special Assessment upon property as and for Special benefits long since accrued to said property, which property had been paid for in whole or in part, other than by Special Assessments therefor upon property abutting thereon; and that the said Statute was and is retrospective in its operation, thereby disturbing rights which had accrued to and become fixed in property holders of Baltimore City coming within the terms and provisions of the said Statute.

58 11. That said Court erred in holding and deciding that, notwithstanding the fact that the said Statute imposed upon the property coming within its terms and conditions a tax which was not contemplated by the authority which improved the various streets of Baltimore City, at the times of such improvement as a means of meeting the expense of the same, is not repugnant to the Federal Constitution.

12. That said Court erred in holding and deciding that Special Assessment upon abutting property for the cost, of improved Streets or a portion thereof is valid, notwithstanding the fact that the Public Benefit as well as local advantage to the owners of such property was the object *to* the improvement.

13. That said Court erred in holding and deciding, that notwithstanding the fact that said Statute levies assessments upon all property coming within its terms and conditions even though the Statute or ordinance under which such improvements were made declared that such improvement was made for the Public Benefit, and not for local advantage to the property abutting upon said improvements, the said Statute is not in conflict with the Federal Constitution, as -foresaid.

14. That said Court erred in holding and deciding that the said Statute is Constitutional and valid, and not in conflict with the Federal Constitution even though said Statute imposed a tax upon bona fide purchasers for value, who became such purchasers after the streets were improved and prior to the passage of said Statute, and without notice or reasonable cause to suspect that any such tax could, would or might be imposed.

15. That said Court erred in holding and deciding that the said Statute was and is not in conflict with the Federal Constitution

59 notwithstanding the fact that said Statute imposed a special assessment upon all property abutting upon streets improved with improved paving, while some of said streets had been improved by private citizens, or at the expense of the State or City out of the proceeds of loans or general taxes levied for that purpose, or in any other manner, except by special assessments.

16. That said Court erred in holding and deciding that the said Statute is not repugnant to the Federal Constitution notwithstanding the fact that the proceeds derived from the assessments thereby imposed go into a general paving fund for the improvements of streets other than those upon which such assessments are thereby levied,

and that the same are not levied to pay for improvements specially benefiting the property thereby assessed.

17. That said Court erred in holding and deciding that the said Statute is not repugnant to the Federal Constitution as being arbitrary and oppressive and imposing a burden upon the classes of property therein described without reference to the relative benefit or due proportion of the various properties thereby assessed.

18. That the said Court erred in holding and deciding that the said Statute is not repugnant to the Federal Constitution, as being unequal, unreasonable, unjust, arbitrary and oppressive in that the apportionment was and is made without regard to an equal distribution of the burden on the various properties thereby affected.

19. That the said Court erred in holding and deciding that the said Statute is not repugnant to the Federal Constitution, notwithstanding the fact that the said Statute requires the payment
60 of said special assessments by all property abutting upon improved streets even though said streets have been wholly paid for, and that said Statute is not void on the ground that the same imposed a double tax for the same benefit.

JOHN HOLT RICHARDSON,
GEO. WASHINGTON WILLIAMS,
Attorneys for Philip Wagner, Inc.

Filed August 26th, 1913.

Whereupon the Court passed the following order, to wit:

The writ of error as prayed for in the foregoing Petition is hereby allowed and the bond is fixed at the sum of Nine Hundred Dollars, in consideration whereof said bond shall operate as a supersedeas bond.

A. HUNTER BOYD,
Chief Judge of the Court of Appeals of Maryland.

Filed August 26th, 1913.

Bond and Approval Thereon.

Know all men by these presents, that we, Phillip Wagner, Incorporated, of Baltimore, Maryland, as Principal, and the National Surety Company, a Corporation of the State of New York, as Surety, are held and firmly bound unto Oscar Leser, A. B. Cunningham, John Gill, Jr., and Jacob W. Hook in the full and just sum of Nine Hundred Dollars ($900.00) to be paid to the said Oscar Leser, A. B. Cunningham, John Gill, Jr., and Jacob W. Hook, their certain attorney, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 22nd day of October, in the year of our Lord one thousand nine hundred and thirteen.

61 Whereas, lately at the Court of Appeals of Maryland in a suit depending in said Court, between Oscar Leser, A. B.

Cunningham, John Gill, Jr., and Jacob W. Hook, plaintiffs, and Phillip Wagner, Incorporated, defendants, a judgment was rendered against the said Phillip Wagner, Incorporated, and the said Phillip Wagner, Incorporated having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Oscar Leser, A. B. Cunningham, John Gill, Jr., and Jacob W. Hook citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Phillip Wagner, Incorporated shall prosecute their writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

[SEAL'S PLACE.] PHILLIP WAGNER, INCORPORATED,
By WILLIAM C. WAGNER, *President.*

[SEAL'S PLACE.] NATIONAL SURETY COMPANY,
By WILLIAM R. PRICE,
Attorney in Fact.

Attest:
JOHN HOLT RICHARDSON, *Sec'y.*

Witness as to Surety:
M. A. McCORMICK.

Approved this 23rd day of October, 1913.
A. HUNTER BOYD,
Chief Judge Court of Appeals of Maryland.

Filed October 23rd, 1913.

62 UNITED STATES OF AMERICA, *ss:*

[Seal United States District Court, Maryland.]

The President of the United States of America to the Honorable the Judges of the Court of Appeals of Maryland, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Oscar Leser, A. B. Cunningham and John Gill, Jr., and Jacob W. Hook, appellants, and Philipp Wagner, Inc., Appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity;
or wherein was drawn in question the construction of a clause
63 of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was

against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Philipp Wagner, Inc., appellee, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 23rd day of October, in the year of our Lord one thousand nine hundred and thirteen.

ARTHUR L. SPAMER,
Clerk District Court of the United States
for the District of Maryland.

Allowed by

A. HUNTER BOYD,
Chief Judge of the Court
of Appeals of Maryland.

Attest:

[Seal Court of Appeals, Maryland.]

CALEB C. MAGRUDER,
Clerk of the Court of Appeals of Maryland.

[Endorsed:] Writ of Error. Filed October 23rd, 1913.

64 In the Court of Appeals of Maryland.

OSCAR LESER, A. B. CUNNINGHAM, and JOHN GILL, JR., Judges of the Appeal Tax Court of Baltimore City, and Jacob W. Hook, Tax Collector of Baltimore City,

vs.

PHILLIP WAGNER, INC.

UNITED STATES OF AMERICA, *ss:*

To Oscar Leser, A. B. Cunningham, and John Gill, Jr., Judges of the Appeal Tax Court of Baltimore City, and Jacob W. Hook, Tax Collector of Baltimore City, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of Maryland, the Court of last resort in said State, wherein the Phillip Wagner, Inc. is plaintiff in error and you are defendants in error, to show cause, if any there

be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable A. Hunder Boyd, Chief Judge of the Court of Appeals of Maryland, the Court of last resort in said State, this 23rd day of October 1913.

A. HUNTER BOYD,
Chief Judge of the Court of Appeals of Maryland, the Court of Last Resort of said State of Maryland.

Attest:

[Seal Court of Appeals, Maryland.]

CALEB C. MAGRUDER,
Clerk of said Court.

65 [Endorsed:] In the Court of Apeals of Maryland. Oscar Leser, et al. vs. Phillip Wagner, Inc. Citation. Mr. Clerk: Please file. John Holt Richardson, Charles J. Bonaparte, Geo. Washington Williams, Counsel for Philip Wagner, Inc. Service of copy is admitted this 24th day of October 1913. S. S. Field, City Solicitor. Filed October 23rd, 1913.

66 STATE OF MARYLAND, *sct:*

I, Caleb C. Magruder, Clerk of the Court of Appeals of the State of Maryland do hereby certify that the said Court is the highest Court of law and Equity in said State in which a decision can be had.

I further certify that the aforegoing is a true transcript of record, opinion of the Court and judgment entered thereon, petition for writ of error, assignment of errors and order of Court thereon, and Bond with approval thereon endorsed, in the case there stated.

And in obedience to the command of the within writ I now transmit said transcript of record together with the original writ of error and the original citation attached in said cause to the Supreme Court of the United States.

In Testimony Whereof I hereunto subscribe my name and the seal of the said Court of Appeals, of Maryland affix- this first day of November, A. D. 1913.

[Seal Court of Appeals, Maryland.]

CALEB C. MAGRUDER,
Clerk of the Court of Appeals of Maryland.

GEORGE WASHINGTON WILLIAMS,
For Appellant.

S. S. FIELD,
For Appellees.

Endorsed on cover: File No. 23,933. Maryland Court of Appeals. Term No. 294. Phillip Wagner, Incorporated, plaintiff in error, vs. Oscar Leser, A. B. Cunningham, and John Gill, Jr., Judges of the Appeal Tax Court of Baltimore City, and Jacob W. Hook, Tax Collector of Baltimore City. Filed November 15th, 1913. File No. 23,933.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 294.

PHILIPP WAGNER, INCORPORATED,
Plaintiff in Error,
vs.
OSCAR LESER, ET AL.,
Defendants in Error.

ON WRIT OF ERROR TO THE COURT OF APPEALS OF MARYLAND.

BRIEF FOR PLAINTIFF IN ERROR.

This case is in this Court upon Writ of Error to the Court of Appeals of Maryland. The Plaintiff in Error, the Appellee in the Court of Appeals of Maryland, seeks the reversal of the judgment rendered against it in the Court of Appeals.

STATEMENT OF THE CASE.

This case originated in the Circuit Court of Baltimore City by a Bill in Equity, the object of which was to obtain a Writ of Injunction restraining the collection of a special tax imposed by the Act of the General Assembly

of Maryland of 1912, Chapter 688. The Bill of Complaint contains a transcript of said Act, and among other things recites that it is in conflict with both the Maryland Bill of Rights and the Constitution of the United States, and particularly the Fourteenth Amendment to the Constitution of the United States, and the Fifteenth Article of the Maryland Bill of Rights.

Upon petition the Safe Deposit and Trust Company, a corporation, was made a party plaintiff to this cause, and in its petition stated that the Act of 1912, Chapter 688, is in conflict with the Fourteenth Amendment of the Federal Constitution, in as much as it attempts to take the property of this petitioner (said Safe Deposit Company), and others similarly situated, without due process of law. And, also, that it is in conflict with the provisions of the Fifteenth and Twenty-third Articles of the Maryland Declaration of Rights. It was agreed on January 7, 1913, that the *seventh paragraph* of the petition of the said Safe Deposit and Trust Company should be considered a part of the original Bill of Complaint, and be treated as if it had been inserted prior to the argument and decision of the Court, with the exception of the words "and now worn out and valueless;" also the schedule of property referred to in said paragraph is to be admitted in the same circumstances.

The Defendant, the Defendant in Error here, demurred and upon full argument and consideration of the cause the Circuit Court overruled said demurrer. From which action the Defendant appealed to the Court of Appeals, which Court reversed the order of the lower Court, from which order of reversal this Writ of Error was sued out.

The Act, in substance, is as follows:

The title thereof recites that it is "An Act levying a *special tax* upon property in Baltimore City, specially benefited by improved paving, the proceeds of said tax to go *into or augment the new paving fund* provided by the Act of 1906, Chapter 404, and the Act of 1908, Chapter 202, and to be *spent by the paving commission* provided for by said Acts. * * * "

Section 1 enacts "that there is hereby levied and imposed upon property in the City of Baltimore specially benefited by improved paving (said property being herein below specified), a special tax of the amount herein below specified, said tax to continue as to *each* property for ten years from the time it attaches thereto, and the entire proceeds thereof to be used for *improved paving in Baltimore City as herein below provided.*"

Section 2 enacts, "That for the purposes of this Act *all landed property* in Baltimore City adjoining or abutting upon any public highway, which *has been* or shall hereafter be paved with improved paving without special assessment of any part of the cost upon the abutting or adjoining property owners, * * * is hereby declared to be specially benefited by such improved paving to an extent greater than the entire amount of the special tax hereby levied thereon." The Section divides *all property* into three classes, A, B and C. "Class A shall include all such landed property in the City of Baltimore adjoining or abutting upon a public highway paved with improved paving and having a width of not less than thirty feet so paved.

"Class B shall include *all* such landed property in the

City of Baltimore adjoining or abutting upon any public highway paved with improved paving and having a width of less than thirty feet and not less than fifteen feet so paved.

"Class C shall include such landed property in the City of Baltimore * * * having a width of less than fifteen feet so paved."

Said Section 2 then goes on to provide the machinery necessary to put the tax into operation, and for the collection of the same.

Section 3 describes the term "improved paving," and it is admitted that the property of the Plaintiff in Error comes within the description, as does the property mentioned in the schedule filed by the Safe Deposit and Trust Company, and made a part of the original Bill of Complaint.

Section 4 declares "That the amount of the special tax hereby levied, shall be as follows: 'On all property embraced in Class A, fifteen cents (15c) per year per front foot or per lineal foot adjoining or abutting upon the public highway. On all property embraced in Class B, ten cents (10c) per year per front foot or lineal foot adjoining or abutting upon the public highway. On all property in Class C, five cents, per year,' etc."

Accompanying the Bill of Complaint, as exhibits, were the title deed to the property of the Plaintiffs in Error and the notice issued by the Appeal Tax Court.

It will be observed that the said Act imposes special tax on (1) property abutting upon streets with improved

paving made many years ago, in whatever state of deterioration or wear it may now be; (2) all property abutting on streets where improved paving has been paid for by the city out of the general levy; (3) all property abutting on streets where improved paving has been paid for by the State; (4) all property abutting on streets with improved paving paid for out of bond issues authorized for that purpose, and (5) property abutting on streets with improved paving which was done by private individuals, at their own expense, either before the street was dedicated, or afterwards; that it affects much property which has changed owners often many times, since the improved paving was laid; and that it subjects to this burden all property, of whatever value or in whatever shape or condition, location or size, abutting on streets with improved paving, regardless of every element, or any element, which might show or tend to show what amount or proportional amount of special benefit it had received on account of such improved paving, or whether it had received any at all. The only exception in said Act being cases where special assessments have been already laid against owners for such paving.

It will be noted, and impressed upon Your Honors by the Counsel for the Defendants in Error, that the amount per front foot is small. But, however, they designed by this means to obtain from the property owners of Baltimore City $5,000,000.00. In this connection it may be remembered that a very small tax caused Charles I to lose his head upon the block. Hallam on the Constitutional History of England, page 247, says:

"Hampden was a gentleman of good estate in Buckinghamshire, whose assessment to the constribution for ship-money demended from his County amounted ONLY

to Twenty Shillings. The cause, though properly belonging to the Court of Exchequer, was heard, on account of its magnitude before all the Judges in the Exchequer Chamber."

"Would Twenty Shillings have ruined Mr. Hampden's fortune?" cried Burke, who then exclaimed, "*No!* But the payment of half twenty shillings on the principle it was demanded, would have made him a slave." Burke, American Taxation, 11.

The Plaintiff in Error, to sustain its view that the said Act is unconstitutional, made the following points:

1—That the Act disturbs vested right, to wit: by imposing a tax or special assessment upon property as and for special benefits long since accrued to said property, which improvements had been paid for in whole or in part other than by special assessment upon the property abutting thereon, that is to say, that the said Statute was and is retrospective in its operation, thereby disturbing the rights, which had accrued to and become fixed in property holders, coming within the terms and provisions of the said Statute.

2—That said Act is invalid, because the proceeds derived from the assessment thereby imposed go into a general paving fund to be used at the discretion of a Paving Commission, created by the Act of 1906, for the improvement of streets, *other than those upon which such assessment is thereby levied*, in the case of all property abutting on improved pavements already laid, and therefore, the said assessment in such cases is not made in any respect to pay for *improvements specially benefitting* the property whereon it is laid, but for the benefit of entirely

different property in other parts of the City and having no necessary connection whatsoever with that subjected to the special levy. In this respect, it differs from any assessment made in any case, which so far as the Counsel for Plaintiff in Error know has been heretofore considered by the Courts.

3—That the front foot rule of apportionment, as prescribed by the Act, and made applicable to the City *as a whole* is arbitrary, inequitable, unjust and oppressive, and is therefore illegal and void, because it takes property without due process of law.

4—That the Act arbitrarily imposes a fixed sum upon property holders for special benefits alleged to have been received, *without giving an opportunity to the property holder to show that as a matter of fact said property is not benefited to the extent to which it is declared by the Act to be benefited,* or to show that the *apportionment* is unreasonable and unequal, and is therefore a "taking of property without due process of law."

5—That the Act imposes upon the property coming within its terms, a special tax which was not contemplated by the authority, which improved the various streets of Baltimore City, at the times of such improvement as a means of meeting the expense of the same.

6—That the Act is invalid because the assessments are made to cover property, which abuts upon improvements made for the public benefit, with but an incidental special benefit to such abutting property.

7—That it covers all property coming within its terms, even though the Statute or ordinance under which such

improvements were made, declared that such improvements were made for the public benefit, and not for local advantage to the property abutting upon such improvements.

8—That the Act imposes a special assessment upon all property abutting upon streets improved with improved paving, notwithstanding the fact that some of said streets had been improved by private citizens, or at the expense of the City or State out of the proceeds of loans, or general taxes levied for that purpose, or in any other manner, except by special assessment.

9—That the Act is void on the ground that the same imposes a *double tax* for the same benefit.

It was also urged in the two lower Courts that the said Act is in violation of the provision of the Fifteenth Article of the Maryland Declaration of Rights, which provides that the persons holding property ought to contribute his portion of public taxes for the support of the government, "according to his actual worth in real or personal property."

ARGUMENT.

The Constitutions of a number of the States declare that "A frequent recurrence to the fundamental principles of civil government, is absolutely necessary to the preservation of the blessings of liberty." We shall therefore briefly advert to the fundamental principles underlying special assessments.

A legislature cannot bind parties interested by a recital of facts, or prescribed conclusive rules of evidence,

for either of these would be only an indirect method of disposing of controversies.

Cooley, Const. Law, page 46.

"Due process of law is not confined to judicial proceedings. The article of the Constitution is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave the Legislature free to make any process due process of law by its mere will and pleasure. Murray's Lessee et al. vs. Hoboken Land & Imp. Co., 18 How. 272."

Ulman vs. Baltimore, 72 Md. at 592.

In Norwood vs. Baker, 172 U. S., at 278, it was declared that "The power of the Legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizens' right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country."

In State vs. Newark,37 N .J . L. 415-423, where the assessment was made in conformity to a statute that undertook to fix, at the mere will of the legislature, the

ratio of expense to be put upon the owners of the property along the line of the improvement, the Court asserted that "If such prerogative has no trammel or circumscription, then it follows that the entire burthen of one of these public improvements can be placed, by the force of the legislative will, on the property of a few enumerated citizens, or even on that of a single citizen. In a government in which the legislative power is not omnipotent, and in which it is a fundamental axiom that private property cannot be taken without just compensation, the existence of an unlimited right in the law-making power to concentrate the burthen of a tax upon specified property, does not exist."

The Court in Thomas vs. Gain, 35 Michigan, 155, 162, speaking through Chief Justice Cooley, said:

"It is generally agreed that an assessment levied without regard to actual or probable benefits is unlawful, as constituting an attempt to appropriate private property to public uses. This idea is strongly stated in Tide-Water Co. vs. Coster, 18 N. J. Eq. (3 C. E. Green) 519, which has often been cited with approval in other cases. It is admitted that the legislature may prescribe the rule for the apportionment of benefits, but it is not conceded that its power in this regard is unlimited. The rule must at least be one which it is legally possible may be just and equal as between the parties assessed; if it is not conceivable that the rule prescribed is one which will apportion the burthen justly, or with such proximate justice as is usually attainable in tax cases, it must fall to the ground, like any other merely arbitrary action which is supported by no principle."

And Judge Earl, speaking for the Court in the noted case of Stuart vs. Palmer, 74 N. Y. 183, declared:

"The Legislature can no more arbitrarily impose an assessment for which property may be taken and sold than it can render a judgment against a person without a hearing. It is a rule founded on the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights: and the constitutional provision that no person shall be deprived of these 'without due process of law' has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the Federal or State Constitution. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty or property. This the Legislature cannot do, nor authorize to be done."

It is always to be remembered that there is great dissimilarity between an assessment or tax for general purposes and an assessment for special benefits. In a general tax levy the amount per hundred dollars' worth of property may well be the same everywhere and apply to various classes of property. But that arbitrary amount per one hundred dollars' worth of property presupposes a valuation of the property against which the general levy is made.

By establishing an arbitrary rule for the apportionment of the benefits accruing to certain property on account of public improvements, all idea of relative benefits amongst the various property affected by the special tax is absolutely excluded from the consideration. It amounts, as Judge Earl said, to "a judgment against a person without a hearing."

Judge Dillon in his treatise on Municipal Corporations,

in Section 761, observes that "decided tendency of the later decisions, including those of the Courts of New Jersey, Michigan and Pennsylvania, is to hold that the legislative power is not unlimited, and that these assessments must be apportioned by some rule capable of producing reasonable equality, and that provisions of such a nature as to make it legally impossible that the burden can be apportioned with proximate equality are arbitrary exactions and not an exercise of legislative authority."

Obedience to the Constitution is what makes constitutional government, "and not the names by which it is called." "Form only determines the methods in which sovereign powers shall be exercised," and when those forms are disregarded the name by which the particular government is named is a misnomer.

The complaint in this case is not that the aggregate amount contemplated by the Act of 1912, Chapter 688, is excessive, as was the case in Parsons vs. District, 170 U. S. 52; or that the Legislature is without power to create a taxing district, but the complaint directed against the arbitrary method of APPORTIONING the specific benefits accruing to each separate piece of property, and because of the fact that the rule applies alike to ALL the property in Baltimore City abutting upon improved streets, and for the other reasons hereinbefore stated.

I.

1. THE ACT IS INVALID BECAUSE THE PROCEEDS DERIVED FROM THE ASSESSMENT THEREBY IMPOSED WERE EXPRESSLY DESIGNED TO BE APPLIED TO THE IMPROVEMENT OF STREETS OTHER THAN THOSE WHICH

HAD BEEN ASSESSED SPECIALLY, AND THEREFORE, THE SAID ASSESSMENT IS NOT MADE TO PAY FOR IMPROVEMENTS SPECIALLY BENEFITING THE PROPERTY THEREBY ASSESSED.

2. THAT THE ACT DISTURBS VESTER RIGHTS, TO-WIT: BY IMPOSING A TAX OR SPECIAL ASSESSMENT UPON PROPERTY FOR SPECIAL BENEFITS LONG SINCE ACCRUED TO SAID PROPERTY, WHICH IMPROVEMENTS HAD BEEN PAID FOR IN WHOLE OR IN PART OTHER THAN BY SPECIAL ASSESSMENT UPON THE PROPERTY ABUTTING THEREON, THAT IS TO SAY, THAT THE SAID STATUTE WAS AND IS RETROSPECTIVE IN ITS OPERATION, THEREBY DISTURBING THE RIGHTS, WHICH HAD ACCRUED TO AND BECOME FIXED IN PROPERTY HOLDERS COMING WITHIN THE TERMS AND PROVISIONS OF THE SAID ACT.

To levy special assessments in this manner would be to utterly disregard the fundamental principle underlying and authorizing special assessments. This has been universally condemned. In Norwood vs. Baker, the Court said:

"An assessment laid on property along a City street for an improvement made in another street, in a distant part of the same City, would be universally condemned, both on moral and legal grounds. And yet there is no difference between such an extortion and the requisition upon a landowner to pay for a public improvement over and above the exceptive benefit received by him."

The principle which prevents the assessment of one street for the improvement of another, should certainly

be equally applicable where two or more streets are assessed to improve two or more other streets. The principle is not varied by any increase in the number of streets either assessed or benefited.

If, at this late day, assessments may be made for special benefits received by property made years ago, why would it not be just as reasonable and lawful for the Legislature to levy assessments for special benefits conferred in the original paving of the City with cobblestones, which were, at the time of their being laid, considered improved paving?

This seems to be a reductio ad absurdum, but the one act would be as reasonable as the other.

The general law relative to taxation has always been held inapplicable to assessments. The general law requires all property to be assessed for the general purposes of government according to its value and therefore, if a piece of property escapes the tax assessors it may later be assessed for such time as it has escaped taxation. That would be imply carrying out an *intention theretofore declared,* and would not to retrospective in the legal conception of that term.

There is no general law with reference to special assessments, and therefore the reasoning applied in support of a subsequent assessment upon property for the purposes of general taxation, is not applicable to this case. The *intention* of the law making body is the *controlling element in determining whether or not a special assessment may be levied,* and after it has exercised its discretion, and the property rights of people who would have been affected by special assessment, have become

adjusted to the law made in the exercise of the lgislative discretion, the said rights are protected by the Constitution.

In support of this contention we quote from 25 Am. & Eng. Encyc. of law, 1176, under the sub-head "Improvements Previously Constructed," which is as follows, "Where the municipality has DISCRETION as to whether a local improvement shall be paid for by special assessment or by general taxation, it cannot, after the improvement had been made, levy special assessment therefor."

Bennett vs. Seibert, 10 Inc. App. 380.
Spaulding vs. Bates, 25 Inc. App. 490.
Galveston R. R. Co. vs. Green, 35 S. W. 816.
Holliday vs. Atlanta, 96 Ga. 377-381.
Kelly vs. Luning, 76 Cal. 309.
Bennett vs. Emmetsburg, 115 N. W. (Ia.), 582-588.
Pease vs. Chicago, 21 Ill. 500.
Doutherty vs. Chicago, 53 Ill. 79.
Market Street Case, 49 Cal. 546.
Alfred vs. Dallas, 35 S. W. 816.
Cooley on Taxation, page 1155.

The case of Seattle vs. Kelleher, 195 U. S., 351, has been cited all through this case as a binding authority against our contention, as above set forth, on this point. The Court of Appeals of Maryland quoted a portion of the opinion of that case, or from the authority of that case, saying:

"That the Legislature had the power to levy the special assessment on account of an improvement previously made, where at the time of the improvement an

assessment had not been made. * * *.'If this were not so, it might be hard to justify reassessments.' "

In that case it was intended that the abutting property holders should pay for the improvement that was about to be made, and it mattered not that some little additional matter, such as planking, was subsequently used in connection with said improvement. The *legislative intention* was that the people enjoying special benefits on account of the WHOLE improvement should pay for such special benefits as might arise from the WHOLE improvment. So, therefore, it will be seen that the language quoted by the Court of Appeals was merely an obiter dictum, and a passing comment of the Court.

The validity of reassessments rests, we respectfully submit, upon the previous intention invalidly expressed, and the reassessment act is simply a *curative proceeding,* an execution perfectly of the legislative will. But, where there is *no previous intention* of assessing for special benefits there is *no foundation for the subsequent act.* The Legislature can undoubtedly validate *imperfect deeds* and thereby confirm the title to property in the vendee, but it certainly cannot be reasoned therefrom, that the Legislature can pass an act *directly conveying the property of A to B.* Neither can an assessment such as the one here involved, be justified on the same principle that a reassessment is justified.

The expressions in the recent text books on this point find their foundation in the said obiter dictum in the Kelleher case, supra. All of the cases referred to by the City Solicitor, as being contrary to our contention, are cases involving reassessments.

In the Matter of the Lands in Flatbush, 60 N. Y. 398, 406, the Court said:

"Had the respondents been originally assessed for benefit conferred under a proper law it might then be said that the assessment was for a public use, and not for a subsisting debt, and such an assessment could have been enforced. But such is not the case. And those assessed are required, by the proceedings of the commissioners, to aid in the discharge of a debt previously contracted and to contribute money which is to be paid into a sinking fund, an dto be appropriated for the payment of bonds, already issued, for the location and improvement of the park."

II.

THE FRONT FOOT RULE, WHEN MADE APPLICABLE TO THE CITY AS A WHOLE, IS ARBITRARY, INEQUITABLE, UNJUST AND OPPRESSIVE.

This method of apportioning benefits has been before various courts of this country for judgment in a great many cases, in some of which cases the courts have said that that method of apportionment was sound, or, at least, was constitutional as applied to the facts of the particular case. Other courts have held the rule to be unsound and in conflict with the due process of law division of the Constitution, when applied to the facts of the particular case then before them for decision.

By reason of this diversity of decisions some text book writers, as well as some courts, have been misled and some confusion has resulted therefrom. But the conflict is more apparent than real, and a careful analysis of the various cases will justify this view.

For instance, in the case of Ulman vs. Baltimore, 72 Md. 587, the special assessment only covered about two city blocks, and was not applicable to the city at large as the statute here involved is, and the front foot rule might have been held to be unobjectionable, on the ground, it may be assumed, that all conditions were equal —but did not do so.

In Cass Farm Company vs. Detroit, 181 U. S. 396, "it was sought to enjoin the City of Detroit from paving a portion of such an avenue," and on the face of the opinion there is nothing in conflict with our contention.

The same may be said of Parker vs. Detroit, page 399, as the complaint involved only "the paving of Woodward and Blaine Avenues," and not the whole or any considerable part of the city. The Michigan Court (124 Mich.) said: "It is claimed * * * that such legislation constitutes taking of property without just compensation, and is a denial of the equal protection of the law. The case of the Village of Norwood vs. Baker, 172 U. S. 269, is the foundation for this position, and seems fully to sanction it."

Zehnder vs. The Barber Asphalt Co., 106 Fed., page 107.

But the Michigan Court gave as a reason for not following Norwood vs. Baker, that the Norwood case involved *eminent domain* and not special benefits for *paving,* and as the case before it involved special benefits from improved streets, that case was inapplicable.

The Michigan Court was certainly in error in taking that view, as is perfectly apparent from but a cursory examination of the Norwood case, because Mr. Justice

Harlan, at page 277, expressly declares that "the assessment of the abutting property for the cost and expense incurred by the village was *in exercise of the power of taxation.*" So that if the Court's premise was false, its conclusion is also false. This criticism holds good as to all of the Michigan cases holding adversely to the Norwood case.

The Supreme Judicial Court of Massachusetts, in the case of White vs. Gove, 183 Mass. 333, by Chief Justice Knowlton, took up the question of the apparent conflict between the various cases theretofore decided by that Court, analyzed them and disposed of the various contentions advanced on all sides, saying:

"We have no doubt of the correctness of our decisions which hold that special assessments upon property for the cost of public improvements are in violation of our Constitution, if they are in substantial excess of benefits received.

See Sears vs. Aldermen of Boston, 173 Mass. 550.
Weed vs. Same, 172 Mass. 28.
Dexter vs. Boston, 176 Mass. 247.
Hall vs. Street Com., 177 Mass. 434.
Londen vs. Coffey, 178 Mass. 489.

"The question of difficulty in dealing with cases of this kind is, how far may the Court interfere with the legislative determination of a method of making special assessments? Of course, if a statute shows on its face that it entirely disregards the relation of the benefits to the taxes to be assessed upon the respective estates, it is plainly unconstitutional.

* * *

"So in different cases a great variety of methods have

been sustained by the Court as within the legislative authority. In Sears vs. Aldermen of Boston, 173 Mass. 71, it was decided before the decision of the Supreme Court of the United States in French vs. Barber Asphalt Co., *ubi supra*, that the assessment by the front foot of measurement on the line of the street, was a reasonable way of making a tax proportional to the benefits from watering a street in the thickly settled part of Boston. On the other hand, it was held in Weed vs. Aldermen of Boston, and in Dexter vs. Boston, *ubi supra*, that such a method was not a proportional or reasonable way of determining benefits from the construction of sewers to be built through streets or private lands IN ALL PARTS of Boston.

"This was so held because cases MIGHT BE EXPECTED to arise under the statute in which such a method would work great injustice, and the two cases referred to were illustrations of the fact that taxation under the STATUTE would be far from the proportional or reasonable. There might be other illustrations of the same fact, depending on different cases."

At page 336, White vs. Gove, supra, the Court continued to analyze the cases which were apparently in conflict with our contention, saying:

"In Sears vs. Aldermen of Boston, ubi supra, it was not intimated that the STATUTE would be constitutional if it purported to justify an assessment by the front foot for watering streets IN ALL PARTS OF THE CITY."

In considering the case of Smith vs. Worcester, 182 Mass. 232, the Court further said:

"It was also said in the opinion that 'perhaps we should have hesitated over the Worcester STATUTE, if it had come before us now for the first time.' "

The Court, returning to the case then before it, went on to say:

"It is contended that the STATUTE now in question, though unconstitutional in cases like those before the Court, where it was formerly considered, is constitutional when applied to cases like the present. This contention is not well founded. It was held unconstitutional in those cases because IT WAS OF GENERAL APPLICATION to sewers to be constructed in ALL PARTS of Boston, through streets or private lands, and it was APPARENT that cases WOULD arise in the GENERAL APPLICATION of it in which, if it was carried out, it would produce disproportionable and unreasonable taxation. In Dexter vs. Boston, ubi supra, the Court says: 'In determining whether a STATUTE is unconstitutional, the question is not whether the result is harmful in the particular case, but whether the STATUTE, according to its terms, will violate the provision of the Constitution in the application *to cases which may be expected to arise.*'

"The STATUTE was plainly intended to apply to ALL SEWERS that might be constructed in the City of Boston."

That case, it seems to us, clearly disposes of the apparent conflict which exists in the various cases involving special assessments, and clearly shows the principle which must always be borne in mind when that subject is approached. It will be noted that the case of White vs.

Gove, and the various cases referred to therein, involved the constitutionality of a STATUTE and not a City Ordinance. The principle enunciated by the Court is as applicable to a statute as to a City Ordinance, notwithstanding statements in certain cases in some of the States.

The reason underlying that principle is well stated by Chief Justice McSherry, in Ulman vs. Baltimore, 72 Md., at 594, in the following language:

"In all cases of grading and paving streets 'the whole cost shall be borne by the abutting owners in proportion to the number of front feet owned by them, respectively.' *Nothing could be more arbitrary than this. The cost is apportioned in advance without any reference whatever to the value of the property;* but solely with regard to the number of front feet; *by which rule the heaviest amount may fall on the least valuable property and the lightest on the most valuable.* * * * Why should the citizens not be allowed to contest the fairness and equality of the front foot rule, or any other rule adopted by the city, when one of the very conditions upon which, as we have seen, the constitutionality of the measure depends, is, that the owner shall have the right to be heard 'upon the question what proportion of the tax shall be assessed upon his land?'"

And in Clapp vs. Harford, 35 Conn. 66, a sewer was the public improvement upon which the special assessment was predicted. Referring to the front foot rule, the Court said: "It disregards entirely the *quantity* of the land affected. Two lots of equal fronts, the one containing double the square feet contained in the other are benefited in *different degrees.* The rule taxes them

alike. This is not in proportion to the benefits received. This rule also ignores the *values* of the land benefited. Two lots, with the *same length* of front may differ greatly in *value*, owing to the difference in *location, or other causes*, and hence be benefited in *different degrees. It is certainly reasonable that the one receiving the greater benefit, should pay the greater tax. Yet an arbitrary rule, like the one contended for, taxes both alike.* * * * "This rule also excludes from consideration any and *all peculiar circumstances which modify the amount* of benefits received. A sewer in one street sufficiently drains the whole premises, another sewer is constructed in the other street, from which he draws little or no benefit. This rule imposes the same burden upon him that it does upon the adjoining proprietor, to whom the new sewer is indispensable."

The Supreme Court of Illinois cannot be satisfied with the position that the earlier cases now require it to take, unless it wants to reverse said decision, because in Wilher vs. Springfield, 123 Ill., 395, 398, the Court said that had it not been that the earlier cases, "settled the doctrine adversely to the contention of Counsel, would surely feel called upon to give it greater consideration than we can do now."

The Court refused to be moved by the reasoning exhibited in the "Able and exhaustive argument of Counsel," but stood by the old cases which were not sound or in logic or law. But, however, this much may be said:

That from what one can gather from the opinion "the similarity of the improvement," and "the situation of the property to be assessed for it, were considered to afford a satisfactory test as to whether they might be em-

braced in a common scheme as one improvement," that, therefore, the rule might have been reasonable in that particular case.

In McKeesport Boro. vs. Busch, 166 Pa. St. 46, the "petition and ordinance were for the improvement of Cliff Street between Fifth Avenue and Elm Street."

The conditions along Cliff Street were very probably equal, or nearly so, and therefore the point made and urged in the case at bar was not argued to that Court.

In Bacon vs. Mayor, 86 Ga., 301, the Statute in question only involved the paving of Liberty Street, and of course is incomparable with a Statute which involved the whole and all parts of a City the size of Baltimore, as the conditions were substantially equal along the whole length of the improvement.

The criticism of the Court in Doughten vs. Camden, 72 N. J., 451, may well be applied to the case at bar. Doughten was assessed "at the rate of seventy-five cents a running foot of the land owned by him adjoining the street in which the City of Camden had laid a pipe for the conveyance of water." In passing upon this question, the Court said: "Since the decision of Tidewater vs. Coster, 18 N. J. L. 518, Am. Dec. 634, and of State vs. Newark, 37 N. J. L. 415, 18 Am. Rep. 729, it has been settled law in this State that the cost of public improvements may be imposed under the power to tax upon lands peculiarly benefited thereby, but only to the extent of the benefits so conferred. Legislation intended to confer power to impose such tax on land, to be valid, must not only limit the power to lands peculiarly benefited, but must expressly or by necessary implication, *limit the imposition to the amount of the peculiar benefit con-*

ferred. The cases in which the doctrine has been applied are too numerous and well known to require citation. The Act under which the assessment under review was made does not impose this charge upon the property along the line of the street by reason of any benefit conferred thereon or, *if it be inferred that such was the Legislative intent, the act is not within the rule, because the imposition is not to be fixed and determined by benefits, nor to be limited to benefits, but is a mere arbitrary imposition without reference to benefits.* The Court below recognized that the assessment before it could not be supported as an imposition by reason of benefits conferred, but found a ground upon which it was concluded it could be supported." The Court, however, decided that that ground was bad.

The case of Baltimore vs. Stewart 92 Md. 535 was differentiated from Ulman's case, 72 Md. 594, by the Court, who said: "What was said in the Ulman case, supra, of the arbitrary character of the rule had relation to the question then before us, not the validity of the rule, but the hardship of its application to a case where a party charged with the payment of the assessment has had no opportunity to be heard. * * * The case at bar is different from Ulman's case, because here ample provision was made for giving all parties interested an opportunity to be heard before the ordinance was passed, and therefore to contest the application or adaptation of the front foot rule to this particular paving if they saw fit to antagonize the rule."

The Court of Appeals of Maryland adhered to the rule or principle that the benefits accruing from public improvements to private property must be *substantially apportioned* amongst the property affected thereby, until

the case of Bassett vs. Ocean City, 118 Md. at 114, came before it for determination. The Court relied for its decision upon Parsons vs. District of Columbia, supra, and French vs. Barber Asphalt Company, Supra, and apparently or practically held that when the Legislature had established a rule of apportionment, however unjust or arbitarary it might be, the Courts must enforce it. The case at bar was decided upon the same ground. These two decisions, amongst others, verify the prophetic observation, of Mr. Justice Harlan, which was concurred in by Mr. Justice White and Mr. Justice McKenna, in his dissenting opinion to French vs. Barber Asphalt Company, in which he says:

"Does it intend to reject as unsound the doctrine that 'the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarily benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement?' Is it the purpose of the Court, in this case, to overrule the doctrine that taxation of abutting property to meet the cost of a public improvement—such taxation being for an amount in substantial excess of the special benefits received—'will, *to the extent of such excess,* be a taking of private property for public use without compensation?' The opinion of the majority is so worded that I am not able to answer these questions with absolute confidence. It is difficult to tell just how far the Court intends to go. But I am quite sure, from the intimations contained in the opinion, *that it will be* CITED *by some as resting upon the broad ground that a legislative determination as to the extent to which land abutting upon the public street may be especially assessed for the cost of paing such street is* CONCLUSIVE *upon*

the owner, and that he will not be heard, in a judicial tribunal or elsewhere to complain even if, under the rule prescribed, the cost is in substantial excess of any special benefits accruing to his property, or even if such cost equals or exceeds the value of the property specially taxed."

The Court in French vs. Barber Asphalt Paving Company, supra, in justification of its conclusion, practically adopted the view of the Missouri Court, which the opinion quotes at page 345:

"The work done consists of paving with asphaltum the roadway of Forest Avenue in Kansas City, thirty-six feet in width, from Independence Avenue to Twelfth Street, a distance of one-half mile. Forest Avenue is one of the oldest and best improved residence streets in the City, and all the lots abutting thereon front the street and extend back therefrom UNIFORMLY to the depth of an ordinary city lot to an alley. The lots are all improved and used for residence purposes, and all of the lots are substantially on the grade of the street as improved, and are similarily situated with respect to the asphalt pavement. The structure of the pavement along its entire length is UNIFORM in distance and quality. THERE IS NO SHOWING THAT THERE IS ANY DIFFERENCE IN THE VALUE OF ANY OF THE LOTS ABUTTING ON THE IMPROVEMENT."

As the *uniformity* spoken of by the Court as existing in that case, *is totally lacking* in this case, that decision is not to be considered as precluding our contention in this case. The Court simply decided that case upon the facts as presented therein, and did not, we think, intend to hold as some Courts have practically decided,

that the legislative determination of the apportional benefits is conclusive.

If the Court of Appeals of Maryland knew of Norwood vs. Baker at the time it decided the Ocean City case, it made no reference to it whatever, but relied entirly upon the Parsons case and the other cases which have been consirered as being in line with it.

If there is any ambiguity in the language of the Court in the cases in 181 U. S., beginning with French vs. Asphalt Co., supra, as has been suggested in the dissenting opinions to those cases, or doubt as to how far the Court meant to go in the matter of arbitrary assessment, *there can be no doubt of the position of the Court as taken in Norwood vs. Baker,* where the Court, in its decree, declared:

"The judgment of the Circuit Court must be affirmed, upon the ground that the assessment against the Plaintiff's abutting property was under a RULE WHICH EXCLUDED ANY INQUIRY AS TO SPECIAL BENEFITS, and the NECESSARY operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation."

The Norwood case directly involves the validity of the front foot rule, provided by STATUTE, where no notice or opportunity was afforded the property holder to contest the reasonableness thereof.

This case, Norwood vs. Baker, announced the principle which should control the case at bar.

The Statute involved in the case at bar, makes no pretense whatever of apportioning the benefits amongst the properties in Baltimore City, affected thereby, according to the benefits received by each piece of property, that is to say, the Statute does not attempt to equitably apportion the benefits. It only declares that all the property benefited by the specified public improvements, is "specially benefited by such improved paving to an extent greater than the entire amount of the special tax hereby levied thereon."

The Statute does not take into consideration the varying conditions which exist in the various sections of the City, which is about six miles square. Of the fact that conditions differ in different sections of the City, the Court will take judicial notice.

According to the Statute, it makes no difference what the depth of the lot may be, whether forty or two hundred feet; what the *character of improvements are*, whether a *large business house in the most valuable part of the business section of the City*, or a *small two-story house in a remote corner of the City;* whether the street be a *wide boulevard* or a street of *thirty feet in width;* whether the lot be worth *a Hundred Thousand Dollars*, in the *Central part of the City*, or but One Hundred Dollars, in the *outskirts* of the City; whether the lot be *irregular in width*, such as a triangular shape, with its base, or its hypotenuse, abutting on the improved street, the amount per front foot to be paid by each, is exactly the same.

That the special tax is based, for its validity, upon the theory that the adjoining or abutting property owners, are specially and peculiarly benefited to substanially

the extent of the amount exacted of them. The framer of the Act of 1912, Chapter 688, bases its general validity upon that principle, and, after he has established its validity thereupon, he then immediately proceeds to disregard that principle by apportioning the special benefits accruing from the improved paving entirely without regard to the proportional benefits received.

To say that a piece of property is fifteen feet front, which is simply a matter of measurement and then to impose a tax of fifteen cents, or any other amount, per front foot, is a clear arbitrary determination of an obligation of an individual to the State by the Legislature—*a legislative judgment,* behind which, the Defendants in Error say, we cannot go.

Common sense dictates that there are many considerations which unbalance this rule or method of apportionment, and they should be weighed against it.

This particular phase of the case at bar is of great immediate importance, as a great many other public improvements have been recently made, and others that are now being made, to which a like rule may be applied. A large *sewerage system* taking in the whole City of Baltimore is now being completed; a new *dock system* has been inaugurated in the harbor of the City, from which special benefits accrue to the property holders which face the docks; *a system of parks,* which confers upon the property abutting thereon a considerable special benefit; a great number of *new school buildings* which may add a special value to the property in their vicinity, as well as a number of *other public improvements* being constantly made in the development and modernizing the City of Baltimore, *any one of which, or all of which im-*

provements may be made the object of a Statute similar to the one herein involved.

If this Statute is upheld, there is little doubt that this means of raising money will be availed of by the City, so that the general tax rate may be kept within reasonable bounds. That this will be done finds some verification in the fact that the City refers to two very old acts of the *General Assembly of Maryland* to sustain the validity of the present Statute. Those acts are *Acts of* 1782, *Chapter* 17, (2 Dorsey's Laws of Maryland, p. 1607); *Act* 1791, *Ch.* 59 (2, 3 Kilty's Laws of Maryland), the validity of which acts has never been drawn into question or decided by the Court of Appeals of Maryland. They were of *small consequence* and were let to *pass without molestation,* Therefore, it seems clear that there is a desire to establish this method as a principle of taxation—as a precedent—which may be employed for all times.

III.

THE ACT OF 1912, CHAPTER 688, IS ILLEGAL AND VOID, BECAUSE IT ARBITRARILY IMPOSES A FIXED SUM UPON PROPERTY HOLDERS AS AND FOR SPECIAL BENEFITS ALLEGED TO HAVE BEEN RECEIVED, WITHOUT GIVING AN OPPORTUNITY TO THE PROPERTY HOLDER TO SHOW AS A MATTER OF FACT SAID PROPERTY IS NOT BENEFITED TO THE EXTENT TO WHICH IT IS DECLARED BY THE ACT TO BE BENEFITED, AND IS THEREFORE A "TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW."

"The Constitution contains no description of those

processes which it was intended to allow or forbid, and it does not even declare what principles are to be applied to ascertain whether it be due process. But clearly it is not left to the legislative power to enact any process which might be devised. * * * The Constitutional provision that no person shall be deprived of life, liberty or property without due process of law extends to EVERY GOVERNMENTAL PROCEEDING which may interfere with personal or property rights, whether the proceeding be LEGISLATIVE, judicial, administrative or executive."

8 Cyc. 1083.
Holden vs. Hardy, 169 U. S. 366.
Murray vs. Hoboken Co., 18 How. 272.
Ulman vs. Baltimore, 72 Md. 587.

"A state can no more deprive a man of life, liberty or property through the medium of a constitutional convention than through an act of Legislature."

Clark vs. Mitchell, 69 Mo. 627.

Because, as the Court in U. S. vs. Cruikshank, 92 U. S. 542, said:

"The Fourteenth Amendment is a restriction upon the States; it adds nothing to the right of one citizen against another, it simply furnishes a guarantee against any encroachment by the State upon the fundamental rights, which belong to every citizen."

And "The design is to exclude arbitrary power from every branch of the government; and there would be no exclusion if such rescripts or decrees were to take effect in the form of a Statute."

Cooley's Con. Lim. 505.

And again, "It is not the partial nature of the rule, so much as its arbitrary and unusual character that condemns it as unknown to the law of the land."

Mr. Justice Johnson, in the Bank of Columbia case, 4 Wheat. 235-44, said:

"As to the words from the Magna Charter Incorporated in the Constitution of Maryland, after volumes spoken and written with a view of their exposition, the good sense of mankind has at length settled to this—that were intended to secure the individual from the ARBITRARY EXERCISE of the powers of government, unrestrained by the established principles of private rights and distributive justice."

And Cooley on Con. Lim, on page 503, says:

"The words 'by the law of the land,' as used in the Constitution do not mean a Statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into MERE NONSENSE. The people would be made to say to the two houses: 'You shall be vested with the Legislative power of the State, but no one shall be disfranchised or deprived of any of the rights of a citizen, unless you pass a Statute for that purpose. In other words, YOU SHALL NOT DO THE WRONG UNLESS YOU CHOOSE TO DO IT.'"

In 8 Cyc., at page 1108, under the head of "Notice or opportunity to be heard," it is stated:

"Before special taxes or assessments can become a fixed and permanent charge on the property of indi-

viduals, they must have had notice of the assessment or some opportunity to be heard and to contest the validity and fairness of such." See cases cited in note. "Proceedings and violation of this principle will be enjoined."

And in 25 Am. & Eng. Encyc. 1173, upon the subject of notice and opportunity to be heard, under the sub-title "Due process of law," it is said:

"Constitutional provisions prohibiting a deprivation of property without due process of law do not prohibit special assessments where, in proceedings for the levy and enforcement of such assessments, the property owners receive an opportunity to be heard, and to contest the validity of the assessment, and the proportion of the general cost of the improvements which shall be assessed against his property." See note.

And on page 1174, continuing upon this subject, it is said that

"The imposition of a special assessment without providing an opportunity to the property owner at any stage of the proceeding for the levy and enforcement of the assessment, to be heard as to the validity of the assessment is unconstitutional as not affording due process of law."

The Act before the Court for construction makes no provision, it will be noted, for a hearing upon any of the points above referred to. The only matter upon which the property holder can be heard, under the provision of the Act, is, first, whether or not the street is paved with improved paving; secondly, as to the width of the street. The property holder is afforded no means or opportunity

of determining the question (1) whether or not the general amount assessed is in excess of the total benefits conferred; or (2) whether or not the general amount of the assessment is apportioned equally amongst the various properties benefited, according to the special benefit conferred upon each.

Maryland Trust Co. vs. Baltimore, 93 Atl. Rep. 454.

The Court of Appeals of Maryland in that case decided that the Legislature could not assess the property specially benefited by the Fallsway for a greater amount than the total expense of its construction, as that would, in effect, be an assessment upon particular pieces of property for the general benefit of the City. That is, to the extent of the excess assessment there would be a contribution by a comparatively few properties to the general funds of the City, which might be disbursed for the general purposes of the city government.

In disposing of the case of Ullman vs. Baltimore, Judge McSherry, at page 594, reasoned thus:

"The property holders *are condemned to pay what is exacted of them*, without having been afforded an opportunity to be heard in their own defense at all. Why should the citizen not be allewed to contest the fairness and equality of the front foot rule, or any other rule adopted by the City, when one of the very conditions upon which, as we have seen, the constitutionality of the measure depends, is, that the owner shall have the right to be heard 'upon the question what proposition of the facts shall be assessed upon his land?' "

It is true, that this case involved a city ordinance, but the reasoning, we submit, is applicable here. The

Court, however, did not attempt to differentiate a rule made by the Legislature from one made by the municipality, saying that some states held that the apportionment made by the Legislature is final, but that the Court would not go into that question, as the cases were not applicable here. From the statement of the case and the reasoning therein contained, it would seem that the Court was not in accord with those decisions. The Court proceeded to say, at page 595:

"But it has been suggested that the order appealed from should be affirmed, because even had an opportunity been given to the Appellant to appear and be heard before the tax was imposed, no different result could have been reached. To this we cannot agree. The constitutional guaranty belongs to the individual by right, AND NOT BY THE MERE FAVOR OF THE LEGISLATURE OR THE SUFFERANCE OF JUDICIAL TRIBUNALS. It is the duty of the Courts to see that this right is not invaded UNDER ANY PRETEXT WHATEVER, when the subject is before them. Its value as a safeguard would speedily dwindle away, or, at least, become exceedingly precarious, if the privilege to assert it were made to depend upon the belief or the opinion of a Judge that it would, if asserted, be available. It is a right of which the citizen cannot be deprived, and he may appeal to it, whatever others may think as to the result of such an appeal. 'It matters not, upon the question of the constitutionality of such a law, that the assessment has i nfact been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but what may by its authority be done.' Stuart vs. Palmer, supra. But we do not admit that, had notice been given the Appellant, it would have been fruitless. It might well be that she could have

shown that she had been improperly assessed, and that the rule of front foot measurement, instead of an actual valuation, was as UNJUST AND ARBITRARY as though adopted and applied for purposes of GENERAL TAXATION. That such a mode of valuation would be tolerated for the latter purposes, no one will seriously contend."

So, therefore, it appears that the Court held the view, that the reasoning in the opinion would be equally applicable to both cases, namely, whether the apportionment was made by the Legislature or by the City Council. The case at bar and the one just preceding it (Bassett vs. Ocean City, supra) were disposed of under the authority of Hager vs. District, 111 U. S. 701, and Parsons vs. District 170, Md., 52, or upon what the Court understood those decisions to mean, namely, that the legislative determination of the question of apportionment was final.

On this point, we respectfully submit, that a notice should have been given even though the apportionment was made by the Legislature; certainly, in view of the oppressiveness and arbitrariness of the rule established by the Legislature, and its unjust and unequal operation in this case, a notice should have been required, and in its absence, the act should be held unconstitutional.

IV.

The Act imposes upon the property coming within its terms, a special tax which was not contemplated by the authority which improved the various streets of Baltimore City, at the times of such improvement as a means of meeting the expense of the same.

For instance, City Ordinance No. 60, approved April 20, 1896, has the following title, "An Ordinance to provide for the grading and curbing and paving of McCulloh Street, from the southeast side of Biddle to the west side of Eutaw Street." The Act makes no reference to special benefits or assessments therefor. The same is true of Ordinance No. 139, approved September 21, 1896, and of a great number of other ordinances providing for paving. Ordinance No. 121, approved April 23, 1906, provides for the paving of certain streets and "*The cost and expense thereof to be defrayed out of the sum of Two Hundred and fourteen thousand five hundred dollars, appropriated in the Ordinance of Estimates for the year* 1906, for the paving with *improved pavement* of Gough Street and other Streets and Avenues."

That Ordinance covers portion of Jefferson, Green, Monument, Woodbrook, Caroline, Hoffman, Madison and Robert Streets, North and Linden Avenues, and eight other Streets and Avenues. So, it is clear from these ordinances, that the Streets and Avenues to be paved thereunder were to be paved for the benefit of the general public, and were to be paid for by the genral public. There was *no intention* at the time of making of those improvments of specially assessing the property abutting thereon. The City Council certainly ought not to be permitted, at this late date, to change its mind as to the method of ultimately paying for said improvments. These improvements were represented to the public as being general improvements, and were to be paid for by the general public, and it is not fair or lawful for the City authorities, after they have lulled to sleep the property holders who would be directly affected by a special assessment, to take advantage of their misrepresentations.

A special assessment at this time, for those improvements, would be nothing less than a *special contribution* by a few property holders to the *general expense* of the government.

What has been said in reference to this point also holds good as to our point five, because whatever special benefits that accrued to the property holders must have been considered as incidental and in no way the object of the improvements, or, even partially for the benefit of said property holders.

V.

The Act covers all property coming within its terms, even though the statute or ordinance under which such improvements were made, declare that such improvements were made for the public benefit, and not for local advantage to the property abutting upon such improvements.

In this event the two acts would be conflicting and it would certainly be against public policy to adhere to the latter act. Property holders would never be secure in their holdings. *An act of this character really amounts to an assessment upon one street for the benefit of another.*

The Act imposes a special assessment upon all property abutting upon streets improved with improved paving, notwithstanding the fact that some of said streets had been improved by private citizens, or at the expense of the City or State out of the proceeds of loans, or general taxes levied for that purpose, or in any other manner, except by special assessments levied against the property peculiarily benefited thereby.

The statements made under the fourth and fifth points are largely applicable here.

In the above instance the assessment is beyond all doubt or question a special one for the general purpose of the City government.

VI.

The Act is void on the ground that it imposes a double tax, in part at least, for the same benefit.

Some of the streets now being especially assessed have been wholly paid for by money derived from taxes paid by all the property in Baltimore City. Therefore, the property in Baltimore City has paid the full price of the improvement. Now, however, it is proposed to collect an additional amount from certain property holders *over and above the whole expense* of such improvement. Thus, the property specially assessed pays, to the extent of its special contributions *doubly* for the improvement.

If the property was to be specially assessed, the amount specially assessed together with the amount to be raised by general taxation, should only *equal the cost price* of the improvement.

Maryland Trust Company vs. Baltimore 93, Atl. Rep. 454.

So, if the property specially benefited is to be assessed its proportion of the *whole cost* of the improvement and then later is specially assessed for *exceptive benefits*, there certainly is a double assessment as to the *difference between the contribution which will be made by it*

if the total amount assessed, by general and special taxation, *only amounted to the cost price of the improvement,* and the amount which *would be contributed if the whole cost price of the improvement is first raised by general taxation and then a special assessment be subsequently made.*

"As to such excess," the Court in Norwood vs. Baker, supra, said:

"I cannot distinguish an Act exacting its payment from the exercise of the power of eminent domain. In case of taxation the citizen pays his quota of the common burthen; when his land is sequestered for the public use he contributes more than such quota, and this is the distinction between the effect of the exercise of the taxing power and that of eminent domain. When, then, the overplus beyond benefits from these local improvements is laid upon a few landowners, such citizens, with respect to such overplus are required to defray more than their share of the public outlay, and the coercive act is not within the proper scope of the taxing power." The Court quoted this language from State vs. Newark, 37 N. J. L. 415.

IN CONCLUSION.

The aggregate amount per front foot of the assessment here involved is $1.50, being fifteen cents per front foot for ten years, on all streets thirty feet or more wide. If the lower Court is sustained, it will establish the validity of city wide universal special assessments by an arbitrary rule of apportionment, and the authorities can then increase the amount as they see fit. Whatever the theory of the decision may be, for all practical purposes the effect

will be to give the Legislature unlimited power in special assessment cases.

The Court of Appeals of Maryland may have stated the law correctly, but we submit that it erred in its application to the facts of the case. It made no attempt to analyze he cases from the standpoint of facts, but simply contented itself with referring to a couple of authorities in a more or less general way. In McBean vs. Chandler, 9 Heisk, 349, 380, the Court said:

"There is nothing more dangerous in the administration of the law than a blind submission to authorities, merely because they have SOME analogy to the case for decision."

Counsel and Courts, as well, are too apt to apply the conclusion of an opinion without a proper anaylsis of the facts, to see whether or not there is not some distinguishing feature in the cases; and this, the Court in the McBean, supra, adjured.

In a measure, the Defendants in Error base their argument for the validity of the law upon the fact of a necessity of the occasion of its enactment. As to this kind of a contention, Judge Storey, in his work on the Constitution, Sec. 9, 1908, has this to say:

"What is to become of Constitutions of governments if they are to rest, not upon the plain import of their words, but upon conjectural enlargements and restrictions to suit the temporary passions and interests of the day? Let us never forget that our Constitutions of government are solemn instruments, addressed to the common sense of the people and designed to fix and perpetuate their rights

and their liberties. They are not to be frittered away to please the demagogues of the day. They are not to be violated to gratify the ambition of political leaders. They are to speak in the same voice now and forever. They are of no man's private interpretation. They are ordained by the will of the people, and can be changed only by the sovereign command of the people."

This case has a broader application, or the determination of this case has a broader scope, than Baltimore City or the State of Maryland. It will be looked to as a precedent and a model for this character of legislation all over the country, as it will clear up whatever doubt may exist on account of an alleged conflict between Parsons vs. District of Columbia, supra, Norwood vs. Baker, and the several cases in 181 U. S., beginning with French vs. Barber Asphalt Co., supra.

For the various reasons herein presented, we respectfully submit that the judgment of the Court of Appeals of Maryland should be reversed.

Respectfully submitted,

CHARLES J. BONAPARTE,
JOHN HOLT RICHARDSON,
GEO. WASHINGTON WILLIAMS,
Counsel for Plaintiff in Error.

SUPPLEMENTAL BRIEF FOR THE PLAINTIFF IN ERROR.

To deal satisfactorily with the questions involved in considering the present Writ of Error, it is obviously indispensable to clearly understand what these questions are, and this is the more important, in the present case, because, in the view of counsel for the Plaintiff in Error, the decision of the Court of Appeals of Maryland is based upon a misapprehension as to some of the essential facts.

We must understand, in the first place, that this is *not* an assessment of property specially benefited by a public improvement to pay the cost of such improvement. The purpose for which the money raised by this tax will be spent is one of *general utility* to *the community at large;* it may *incidentally* and *accidentally* involve a special benefit, in some cases, to some of the property burdened with the tax, but, in a large proportion of instances, the property assessed will derive *no special benefit whatever* from the expenditure of the tax, and in *all* cases, without *any* exception, the burden imposed has no logical relation whatsoever to the benefit conferred, but is fixed by a *purely arbitrary* rule, laid down by the Legislature and with no opportunity afforded for judicial investigation as to the equity of the rule in any particular case.

The purpose of the tax is to provide funds for improved pavements in those parts of Baltimore City which the Paving Commission, established by earlier Acts, may deem in need of such improved pavements. Had the Legislature imposed a *valuation* tax on *all* property within the City for this purpose, or had a provision been

made for an issue of bonds by the Municipality, the interest on which would be paid by means of such a tax, or had abutting property on the streets actually improved under the direction of the Commission been charged with the cost of the improvements, either wholly or in part, the remainder of such cost being met, in the latter contingency, through one or the other, or both, of the methods above indicated, in all of these cases, the procedure might not have amounted to an infringement of the rights of the Plaintiff in Error and others in like situation, under the Federal Constitution and especially under the Fourteenth Amendment, and it might also have accorded with previous decisions of the Maryland Court of Appeals and provisions of the Maryland Constitution.

But what the Maryland Legislature did was to segregate from all the taxable property in the City, a portion of that property, namely, so much real estate as might abut on streets *previously or subsequently* paved with certain designated kinds of pavement described by the Legislature as "improved," to exempt from the portion thus segregated so much of this real estate abutting on streets thus paved as might be hereafter, or might have been heretofore, assessed to pay the cost of such paving, and then to impose on the remainder of the segregated property not covered by the exemption a purely arbitrary burden, determined entirely by the number of front feet abutting on the street heretofore or hereafter so paved. It is respectfully submitted that the owners of the real property thus singled out for the imposition of this arbitrary burden have not received the full measure of impartial protection for their rights of property required by the Fourteenth Amendment, and that their property has been or will be taken by the State of Maryland without due process of law.

A futile and disingenuous attempt is made in the statute to escape the necessity for some form of notice and hearing as to the existence of any special benefit to the property affected by this tax by a legislative declaration that all such property has been or will be benefited, *not,* be it carefully remembered, by what is to be done with the money raised by the tax in question, but by the improved pavement already or to be hereafter laid down in the streets on which it abuts, to an extent exceeding the aggregate amount of the tax. Of this declaration, in so far as it affects streets already paved, it is sufficient to say that, in the first place, the Court must take judicial cognizance of the obvious impossibility that the Legislature could know what effect had been, in fact, produced upon the values of thousands of lots of ground in all parts of the City by the paving of abutting streets with all sorts of different kinds of pavement five, ten, twenty or even forty years before this law was passed. It could be undoubtedly shown beyond dispute in many cases that the pavement in question did not add one dollar to the value of the abutting lots of ground.

Secondly even if this declaration were true i nfact or must be assumed to be true, the increase in value to the property affected is wholly immaterial because that increase is in no wise the result of the expenditure of the money raised by this tax. The residence of one of the counsel signing this brief fronts on a street which, a number of years ago, was paved with improved pavement at the personal cost of a public-spirited citizen residing on the opposite side of the street; the counsel in question does not believe that the market value of his property was in any wise increased by the change of pavement; but, if we suppose that it was, is that any reason why he should be singled out to pay an extra tax

for the purpose, *not* of reimbursing the generous donor of the improved pavement but of enabling other streets to be paved in distant parts of the City where the improved pavements may or may not be a general public benefit but cannot be by any possibility a special benefit to him as the owner of this piece of property?

In many cases the owners of abutting property on certain streets in Baltimore City have been greatly dissatisfied with the decision of the Paving Commission not to put down improved pavements in their streets. Suppose some of these property owners should decide to put down such improved pavements entirely at their own expense; ought this exhibition of liberality and public spirit to subject their property to a special burden to pay for the paving of other streets? Yet this is the effect of the law.

When examined in its true light it becomes evident that the statute in this case constitutes an attempt by the Legislature to impose a special and discriminating tax on a certain class of property owners in Baltimore City for the advantage of the general public and without any return to them as individuals for the expenditure of their money.

In Spencer vs. Merchant, 125 U. S. at 356, as to the extent of the power of legislation to directly impose an assessment the Court says:

"When the determination of the lands to be benefited is entrusted to commissioners the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much.

But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not; but only upon the *validity of the assessment,* and its *apportionment, among the different parcels of the class* which the legislature has conclusively determined to be benefited.

"The *statute* of 1881 *afforded the owners notice and hearing upon the question of the equitable apportionment among them of the sum directed to be levied upon all of them* and thus enable them to *contest the constitutionality of the Statute;* and that is all the notice and hearing to which they were entitled."

* * * * * * * * * * * *

It is respectfully submitted that this is plainly a taking of their property without regard to their rights under the Federal Constitution.

CHARLES J. BONAPARTE,
JOHN HOLT RICHARDSON
GEO. WASHINGTON WILLIAMS,
Counsel for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 294

PHILLIP WAGNER, INCORPORATED,
Plaintiff in Error,
vs.
OSCAR LESER ET AL.,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR IN REPLY TO "MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM THE JUDGMENT BELOW."

The motion to dismiss or affirm is based on two grounds:

1. That this Court is without jurisdiction in the case.

2. That it is manifest that said writ of error was taken for delay only; that the questions on which the decision of the said cause depends are so frivolous as not to need further argument.

As to the second point, we respectfully refer your Honors to the *brief and supplemental brief* filed by

Counsel for Plaintiff in Error, which has been filed prior to the filing hereof.

As to the first point, we respectfully submit that this Court has jurisdiction over this cause, and that the statement in the brief accompanying the said motion, page 12, "*This mere allegation* (the allegation that the act of the Maryland Legislature was 'in conflict with the Fifth and Fourteenth Articles of the Amendment to the Constitution of the United States,' etc., page 11), *is not sufficient to raise a Federal question,*" is not well founded and is not supported by the authorities therein referred to.

In Capital City Dairy Company vs. Ohio, 183 U. S. 238-248, it was said that the Federal question *had not been called to the State Court's attention* and was not considered by it.

In Bollen vs. Nebraska, 176 U. S. 83, in the syllabus, it is said:

"An objection that a Defendant was denied due process of law in being refused a jury trial upon a plea in abatement, cannot be raised here, when no violation of the Fourteenth Amendment was set up UNTIL after the cause had been decided by the Supreme Court of the State."

In another part of the proceedings, where it was stated that "This prosecution is in the contravention" of the Fourteenth Amendment, the point was considered and disposed of.

In Chapin vs. Fye, 179 U. S. 128, 130, "The only refer-

ence to the Fourth Amendment is in the assignment of errors," and the Court therefore refused to consider the question. Mr. Justice Brown, however, dissented, saying that the "Defendant intended to claim the benefit of the 'due process of law' clause."

Hulburt vs. Chicago, 202 U. S. 275, was disposed of along practically the same ground.

The Plaintiff in Error directed the Court's attention to the Fourteenth Amendment in both the fifth and sixth paragraphs of the Bill of Complaint, and both the Circuit Court and the Court of Appeals took notice of the intention of the Plaintiff in Error to raise the Federal question under said Amendment, because the lower Court, in its opinion, said: "The assessment is attacked *as in contravention* of Article 15 of the Declaration of Rights of the Constitution of Maryland, *and of the Fourteenth Amendment of the United States Constitution, especially of its inhibition against the deprivation of property without due process of law.*" (Record, page 22).

The Court of Appeals said:

"The questions to be determined arise upon a demurrer to a bill in equity for an injunction to restrain the collection of the special paving tax upon the ground that Chapter 688 of the Acts of 1912, imposing the tax, is *invalid and unconstitutional,* as in conflict with the Fifteenth and Twenty-third Articles of the Declaration of Rights of the State *and also with the Constitution of the United States.*" (Record, page 29).

See

Spencer vs. Merchant, 125 U. S. 352.
Life Insurance Co. vs. Needles, 113 U. S. 574, 579.

This, we think, certainly together with a cursory reading of the *opinions* of the two lower Courts, puts the question of jurisdiction at rest.

We therefore respectfully submit, that the motion to dismiss or affirm should be denied.

Respectfully submitted,

CHARLES J. BONAPARTE,
JOHN HOLT RICHARDSON,
GEO. WASHINGTON WILLIAMS,
Counsel for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1944

No. 23

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NOTE.—In this Brief, references to the record are to the marginal pages.

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NOTE.—That the expressions, "Court below" and "lower Court" refer to the Circuit Court of Baltimore City.

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Supreme Court of the United States

OCTOBER TERM, 1914

No. 294

PHILLIP WAGNER, INCORPORATED,
Plaintiff in Error,

VERSUS

ORCAR LESER, A. B. CUNNINGHAM AND JOHN GILL, JR., JUDGES OF THE APPEAL TAX COURT OF BALTIMORE CITY, AND JACOB W. HOOK, TAX COLLECTOR OF BALTIMORE CITY,
Defendants in Error.

In Error to the Court of Appeals of the State of Maryland.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

A bill was filed in the Circuit Court of Baltimore City by Phillip Wagner, Inc., owners of certain property in Baltimore City abutting upon a street improved with improved

paving, viz: vitrified blocks, against the Judges of the Appeal Tax Court and the Tax Collector of Baltimore City for an injunction to restrain the collection of the Special Paving Tax levied by the Act of 1912, Chap. 688, upon property in the City of Baltimore specially benefited by improved paving. The property so benefited is specified in the Act by description, as belonging to one or the other of three classes—A, B and C. The amount of the tax is different on the three classess. The Appeal Tax Court is directed by the Act to classify all the property of the City subject to the tax under its proper class, and to certify their action to the Collector, and the Collector is directed to collect the tax. Hence, the bill for an injunction to restrain the collection of such tax was filed against the Appeal Tax Court and the Collector of Taxes, being, of course, in reality against the City. The bill alleges as a reason for the injunction that the Act is unconstitutional on various grounds; the defendants demurred; the Court below sustained the contention of the plaintiff on two points, and, therefore, overruled the demurrer. From the order overruling the demurrer an appeal was taken to the Court of Appeals of Maryland, who reversed the decree of the Court below and dismissed the bill. From this decree of the Court of Appeals, *one* of the plaintiffs sued out a writ of error to this Court. The other plaintiff, the Safe Deposit & Trust Company, represented by former Judge Alfred S. Niles, did not join in the petition for the writ of error.

View of the Lower Court.

The Court did not find that the Act violates *any specific provision* of the Constitution; but took the view that the special paving tax provided by the Act does not fall within the principle upon which assessments for local improvements are upheld, and that, as to property abutting on streets paved before this Act was passed, the Act is void.

The City's Contention.

The contention of the City is that the *present existence* of improved paving on a street is a benefit to the abutting property, and gives to such property *a value above what it would have if such street were paved with cobbles;* and, if such improved paving has been done at the public expense, the benefit thus conferred on the property at the public expense, justifies a special tax on such property so benefited; that this benefit to the abutting property is a *continuing benefit,* and if the improved paving is there *now,* giving *now* an additional value to the abutting property, a special tax on such property is justified, as well where the paving was laid before the passage of the Act, as where the paving is laid after the passage of the Act.

View of the Court of Appeals.

The Court of Appeals of Maryland held that the Act was not obnoxious to any provision of the State Constitution, or contrary to the Fourteenth Amendment to the Constitution of the United States; that the Act provided ample notice and opportunity for the property owners to be heard in regard to the classification of their property under the Act; that the Legislature had power to levy a special tax for local improvements and to fix the amount of it and the legislative action was conclusive, unless it was arbitrary or oppressive, and that there was no objection to including in the Act property abutting on streets theretofore paved, where the improved paving and the benefit therefrom still exists and affords a present consideration for the tax or assessment.

See the opinion of the Court in the Record, pages 43 to 51.

Importance of This Case.

Several hundred miles of cobble stone streets, in a city the size of Baltimore, in this age of progress and modern

improvements, are such a detriment to the City as might almost be characterized as a disgrace.

The paving is the first thing and the last thing that is thrust upon the attention of every visitor to the City.

It is important, therefore, to have a *systematic plan of improved paving throughout the City,* not patches here and there on streets, nor even streets here and there so paved.

The City administration has been doing everything it can to facilitate this vital improvement. Men of the very highest standing in the City were selected for the Paving Commission—Douglas H. Thomas, General Alfred E. Booth, Samuel C. Rowland, Leonidas G. Turner, and R. Keith Compton.

This Commission has made a comprehensive plan for improved paving throughout the City, relying upon the special paving tax to furnish the additional money necessary to carry out that plan.

If this tax law is unconstitutional, then their plans must be changed, and *instead of a comprehensive plan of improved paving throughout the City, they must pave here and there* eventually about one-half of the City, with the proceeds of the loan; because it is felt that the Council will not adopt the Buffalo system of assessment in view of the fact that a number of streets have heretofore been paved without any assessment; and it is extremely doubtful, in view of the enormous amount of loans which have been issued for other improvements, whether another loan could be passed. On the other hand, if this law is constitutional, the additional money is provided without attempting to resort to the assessment plan, and without trying to secure another loan; *and it is provided now,* so that the Paving Commission can count upon it and go ahead with their plans for improved paving throughout the entire City; and it is provided in a way that *will bear so lightly upon each taxpayer* that one could almost hope that no taxpayer would make any objection to it, except for

the fact, which has been frequently demonstrated, that, with a great many people, the civic spirit stops abruptly when they are called upon to pay *a tax, no matter how small.* And so we find taxpayers seriously talking of being deprived of their property without due process of law and a violation of the Bill of Rights and of the State and Federal Constitutions, by a tax which is really so trifling that it almost comes under the maxim, "*de minimis lex non curat.*"

Taking the houses of the plaintiff in the bill in this case as an illustration, the tax is *only* $1.80 *a year, or* $18.00 *for the whole ten years,* for the benefit of abutting upon a handsome, clean and attractive highway, instead of abutting upon an unhealthy and unsightly rough cobble stone street.

Yet, *as small as the charge is on each property,* we are assured by careful calculations of engineers that in the course of the ten years for which the tax runs upon each property, the tax will produce a sum which, together with the five million dollars provided by the loan, will be sufficient to carry out the Paving Commission's plan for a system of improved paving throughout the City.

The reasons why the tax can be *so moderate and yet be sufficient,* are: First, because we have $5,000,000 provided by a loan, and secondly, because the tax is to be collected not only from property abutting on streets to be paved out of the loan, but also from property abutting on streets which have been heretofore paved out of the general levy or out of other loans.

This is the reason why we emphasize the point that the law is valid, not only as to streeets paved after its passage but also as to streets paved before its passage. To hold that the law is valid only as to streets paved after its passage, would materially diminish the *amount* the tax will produce, which amount is needed to carry out the full plans of the Paving Commission for a complete system of improved paving throughout the City.

Origin and Purpose of the Act.

The purpose of the Act of 1912, Chapter 688, was to double the fund provided by the Act of 1906, Chapter 401. The latter Act provided for the creation of a Paving Commission, with powers to adopt and carry out a comprehensive plan for improved paving throughout the City, and provided a fund, by means of a loan of $5,000,000 for that purpose.

The Act of 1906 was amended in some respects by the Act of 1908, Chapter 202—the amendments, however, not making any change in the purpose of the Act of 1906. The loan authorized by the Act of 1906 was not submitted to the people for ratification until the election of May 2, 1911, and the Paving Commission was not appointed until May 29, 1911. This loan came before the Court of Appeals of Maryland, and was held valid, in the case of Bond vs. The Mayor and City Council of Baltimore, No. 42 of the January Term, 1912.

After the Paving Commission was appointed, and its engineers began to make calculations and study a comprehensive scheme for improved pavements throughout the City, as contemplated by the Act, they found that $5,000,000 would not be sufficient for the purpose, but that it would require just about double that amount. The situation which then confronted the City administration was this: Either the comprehensive scheme for a complete system of improved pavements throughout the City, contemplated by the Act, could not be carried out; or some means must be devised to furnish the additional $5,000,000. Two possible means of furnishing the additional $5,000,000 were at once suggested:—

1. An additional loan of $5,000,000.

The objection to this plan was, and is, that such en enormous amount of loans have been floated by the City since the great fire of 1904; the loans authorized since that date amounting to $55,000,000.00; that it is doubtful whether

the people would ratify another loan for paving purposes; and it is safe to say, perhaps, that the best judgment of thoughtful citizens is that the people ought not to burden the City with a further loan, of that amount, for paving.

2. It was suggested and urged in many quarters—particularly by one of the newspapers—that the fund should be augmented by charging the cost of the new paving, done out of the proceeds of the loan, on the abutting property owners at the rate of 1/3 on the property on each side and 1/3 on the City,—the last third, of course, to come out of the loan.

The objections to this plan were that the City had paved quite a number of streets, amounting in all to a good many miles of paving, out of loans or out of the general levy, without any charge on the abutting property. There are certain streets in the City which had been paved with improved paving and the cost assessed on the abutting property; but after the Court decided an assessment for such purpose to be void, in the first Ulman case, 72 Md., the City authorities apparently became needlessly alarmed, and abandoned the policy of trying to collect the cost of improved pavements from the abutting property and proceeded to pave quite a number of streets, from time to time, with improved paving, without any charge on the abutting property. Some property has thus been enjoying, *and is still enjoying,* the benefit of abutting on improved pavements *without any contribution to the expense thereof,* except, of course, its contribution to the sum raised by the general tax levy; and *to that sum the property which then, and ever since, has abutted on cobble stone streets has contributed, from year to year, at the same rate as the property abutting on such improved pavements.* When, therefore, it was proposed that, as the new paving was done out of the $5,000,000 loan, the property, abutting on the streets *to be paved,* should be charged with two-thirds of the expense of the paving, the owners of property abutting on

cobble stone streets immediately raised a determined objection to that plan. That plan is usually referred to as the Buffalo Plan, because it is the plan which has been followed in Buffalo. There is nothing unfair about the Buffalo Plan itself, *if the City at the beginning of making improved pavements had adopted that plan and applied it without discrimination to all the improved paving done.* That had not been done in Baltimore; on the contrary, many miles of streets had been paved with improved paving, a great deal of which is just as good today as when laid, without any charge on the abutting property. Hence, the owners of property on cobble stone streets, which are now to be paved out of the loan, said: "It is not fair for the City to charge us two-thirds of the cost of improved paving on our streets, when the City has paved other streets in Baltimore with improved paving without any charge on the abutting property." It was not easy to make any answer to the objection, and inasmuch as, under the Act of 1906 and the amendment of 1908, no plan *of special assessment on the abutting owners could be adopted without an Ordinance,* it became apparent that, in the state of public feeling and sentiment on the subject, no such ordinance could be expected to pass the City Council.

The plan of a special paving tax was devised to meet the objection that it was unfair to make special assessment on the property abutting on one street paved with improved paving, and to pave another street with improved paving and make no charge on the abutting property. The amount of the tax was carefully calculated so as to produce $5,000,000, or a sum which, together with the $5,000,000 provided by the loan, would be sufficient to carry out the scheme of the Act of 1906 for a comprehensive plan of improved paving throughout the City. The plan thus evolved answers the objection of unfairness by placing *the same burden upon all property which, in fact, enjoys the same benefit.* It is not

claimed that the amount of the tax is exactly proportionate to the amount of benefits received, because such exactness is not possible and is never attained in any scheme of taxation; but the claim is made that every property which, at the time the Act of 1912 went into effect, was enjoying, or which thereafter should enjoy the benefit of abutting upon an improved pavement, constructed without special expense to the abutting property, will pay, substantially the same return for that benefit.

That the above is the purpose of the Act of 1912 is clearly indicated by the provision, near the end of Section 2 of the Act, which provides that the entire proceeds of the tax shall be paid over by the Collector "to the Comptroller, to be by him deposited with the City Register and to *be placed to the credit of the new paving fund provided for in the Acts of* 1906, *Chapter* 401, *and* 1908, *Chapter* 202, *and to be exclusively applicable to the cost of the work authorized by said Acts or by any amendment or amendments thereof.*"

Act of 1912, Chapter 688, Sec. 2.

All of the facts hereinabove stated, as to the purpose of the Act of 1912, Chapter 688, are not specifically stated in that Act, and, therefore, do not appear in the bill by express allegations, but the rule is that every intendment will be made in support of a legislative Act; it will be presumed to be valid; if any matters of fact would show it to be invalid, they will not be presumed, *but the party attacking the Act must allege and prove such facts.* The converse of the proposition is true—that, in support of the Act, the Court will presume to exist such reasonable facts as would show the constitutionality and validity of the Act.

Provisions of the Act.

Act of 1912, Chapter 688, imposes upon property in the City of Baltimore specially benefited by improved paving

wholly at the public expense, a special paving tax of a certain amount per front foot to run for ten years from the time it attaches to each property; the whole proceeds of the tax to be used for improved paving. (See Provision above quoted, and see entire Act quoted in Bill, Record, pages 4 to 6.)

Property Upon Which the Tax is Laid.

Property, specially benefited by improved paving and upon which the tax is laid is defined in the Act, Section 2, as:

> "all landed property in Baltimore City adjoining or abutting upon any public highway which has been or shall hereafter be paved with improved paving; without special assessment of any part of the cost upon the abutting or adjoining property owners; by the City of Baltimore or State Roads Commission or other public Commission or Agency * * * ."

Such property, said Section 2 further provides:

> "is hereby declared to be specially benefited by such improved paving to an extent greater than the entire amount of the special tax hereby levied thereon." (Record, p. 4.)

Amount of the Tax.

By said Section 2 the property thereby made subject to the special paving tax is divided into three classes:

Class A comprises all such property abutting on such streets having a width of not less than thirty feet so paved with improved paving.

Class B includes all such landed property on a public highway so paved less than thirty feet and not less than fifteen feet wide.

Class C includes all such landed property on a public highway so paved less than fifteen feet wide.

The tax levied on Class A is fifteen cents per year per front foot; on Class B ten cents per year per front foot, and Class C five cents per year per front foot. (Section4, Record p. 6.)

The amount of this tax is more readily understood by illustrations: Take a twelve-foot front house on an alley or narrow street,—the tax will be sixty cents a year for ten years, or six dollars for the entire ten years; take a fourteen-foot house on a medium width street, the tax will be $1.40 a year for ten years, or fourteen dollars for the whole ten years; take a twenty-foot house on any street over thirty feet wide, the tax will be $3 per year, or thirty dollars for the entire ten years. These amounts were not reached at haphazard, but are the result of careful calculation aiming to levy no more than was necessary to produce the $5,000,000 needed; and, secondly, to make the levy less than if the expense of the improvement had been assessed, according to the Buffalo Plan, on the abutting property owners. *And it will be found, by calculation, that the amount of this tax, on any street that can be picked out which is paved with any improved pavement specified in the Act, is less than the proportionate share of such property, of the expense of such paving would be, if charged on the abutting property according to the Buffalo Plan.*

Time When the Tax Attaches.

By Section 2 the Appeal Tax Court is directed to classify all property subject to the tax under its proper class, A, B, or C, and certify their action to the Collector, who will then collect the tax as other taxes are collected.

Before classifying, the Appeal Tax Court is required to give the same notice and there is the same right of appeal from their action as in case of classification of property in the Annex under the Act of 1908, Chapter 286. (Section 2.)

Section 2 further provides that the tax should begin in 1913 on all property coming within the description of the Act on November 1, 1912. For 1914, the Appeal Tax Court is to classify all property coming within the description of the Act on November 1st, 1913, and not theretofore classified, and so from year to year.

On each property, however, the tax runs for ten years from the time it attaches, and no longer. (Section 1.)

Definition of Improved Paving.

The Act defines improved paving as follows:

> "That improved paving as used in this Act shall mean any substantial smooth paving above the grade of ordinary macadam and shall include granite or belgian block vitrified brick or block, wood block, asphalt or concrete block, sheet asphalt, bitulithic, bituminous macadam, and bituminous concrete."

This enumeration in fact includes all improved paving now known.

There is very little difference, so far *as the appearance is concerned, and so far as the benefit to the adjoining property is concerned*, between these different kinds of improved paving; the determining factor, in selecting one or the other *kind of* improved paving, is the *amount and kind of travel* that is expected on the street.

For the heaviest and hardest travel, belgian blocks or wood blocks are best suited, although the use of wood blocks has been discontinued because they are so much more slippery than any other kind of paving.

Next in efficiency for heavy travel are vitrified blocks, sheet asphalt or asphalt blocks or bithulithic. Bituminous concrete and bituminous macadam have almost the same appearance as bithulithic or sheet asphalt, but will not stand heavy continuous travel. For residential neighborhoods,

where the travel is light, bituminous concrete or bituminous macadam is just as attractive and really just as good as any other kind of paving.

It may interest the Court to know the present cost of these various kinds of improved paving.

Bituminous concrete and bituminous macadam cost about $1.30 per square yard; sheet asphalt about $1.85 per square yard; vitrified blocks about $2.10 per square yard, and granite or belgian blocks about $3.40 per square yard. Wood blocks are more expensive than belgian blocks. No bitulithic or asphalt blocks have been laid recently. What was formerly laid cost about $2.25 per square yard.

These prices do not include the cost of grading, if any, or putting in new curb, or straightening or resetting the old curb, which items usually add very considerably to the average per square yard, above the prices here given.

The theory of the Act in making no difference in the tax on account of the *kind of improved paving* on the street is based upon the following consideration:

First, that one kind of improved paving is about *as attractive and as beneficial to the adjoining property* as another; that the selection of the kind of improved paving is, or ought to be, *made chiefly with regard to the needs of public travel*, and, therefore the abutting property owner ought not to be charged *more because an expensive belgian block pavement is put down in the street to accommodate the heavy traffic when a cheaper paving would be just as attractive and just as beneficial to his property.*

Secondly, it is not practicable to go into minute refinements in fixing a tax; all that is attainable is substantial equality; and that is accomplished by making three classes, based upon the different widths of the streets and without

attempting to make further classes on account of the kind of improved paving which the public travel might require on a particular street.

Thirdly, no property owner affected by the tax has any real grievance on account of the amount of the tax unless it is more than his proportionate cost of the paving of the street in front of his property would be; and, as above stated, it will be found upon calculation, *taking any street you may choose in Baltimore,* that the amount of the tax on any property abutting on that street will be less than would be that property's proportionate share of the expense of paving the street in front of such property with the least expensive of the improved paving specified in the Act.

Has the Advantage of Simplicity.

Under the Paving Tax Act, the owner of every property affected can know exactly what his tax will be. It is a simple matter of arithmetic to ascertain the width of the street and the number of front feet of his property; whereas, under any form of assessment, it is a matter of rather intricate calculation, dependent upon the kind of paving used, the amount of grading, the kind of curbing, etc., to ascertain what the proportionate charge upon each abutting property will be.

Easier Payments.

Under the Paving Tax Act there is a certain sum to be paid each year for ten years.

Under any form of assessment the usual custom is to divide the total assessment on the property into installments of three or five years and make each of the installments bear interest from the time the work is done until paid.

So that, under the assessment plan, the charge would be heavier, the installments larger, and there would be addition of interest.

Avoids Expense and Delay of Litigation.

If this Special Paving Tax Act is valid this *one suit* will end the litigation under it; the whole problem of having improved paving throughout the City will be settled; every abutting property owner will know just what he will have to pay; and the property owners and the City will be saved the expense and delay of frequent litigation.

In the past, nearly every time the City passed an ordinance for paving, and providing for assessments, long and expensive litigation resulted. Many such cases came to this Court, and are found from Moore's Case, 6 H. & J., to Stewart's Case, 92 Md. Under the Paving Tax Acts of 1782 and 1791 (hereafter quoted), *there was not a single case,* and the present *will be the only case* under Act of 1912, Chapter 688. (The City has collected from this paving tax up to October 1, 1915, $329,478.38.)

Treats All Alike.

Under the special paving tax, the owner of every property abutting on a street paved with improved paving at the public expense pays the same amount per year and for the same number of years; under the assessment plan on one street the Council may pass an ordinance requiring the entire cost of the paving to be assessed upon the abutting property; on another street two-thirds of the cost may be assessed on the abutting property; on another street one-half of the cost may be assessed on the abutting property, and on still another street the Council may put none of the cost on the abutting property.

Again, on one street the Council may determine to put belgian blocks at $3.40 per square yard, and charge the cost on the abutting owner, where sheet asphalt at $1.80 per square yard would have answered every purpose, or if belgian blocks were really required it would be because of the travel on the street, and not because of any benefit to the abutting property over a cheaper form of improved paving.

So that the whole system of special assessments, when left to be levied by ordinance, depends on a great many uncertainties; the kind of Council the City might happen to have at the time the ordinance is passed; the prevailing sentiment at the time; the amount of influence which the owners of property abutting on any street may happen to have with the members of the Council; the risk of some defect in the ordinance and many other contingencies.

It is not surprising that such a system results in haphazard, crazy-quilt paving, and gross inequalities, and favoritism. It has so resulted in Baltimore City.

There are some pieces of Belgian block pavement in the outlying residential part of the City, where bituminous concrete or macadam or asphalt would have answered every purpose; some streets have been paved and the entire cost put on the abutting property; some have been paved and two-thirds of the cost put on the abutting property, and a great many have been paved with improved paving and none of the cost put on the abutting property.

Again, if the cost is put upon the abutting property by means of an ordinance, by the assessment plan, the paving Commission will not be left free to exercise their judgment as to the best kind of improved paving to put on the streets in accordance with the demands of the public travel, because the owners of abutting property will be clamoring at the doors of the Council for the cheaper forms of improved paving so as to make their assessments less.

All these inequalities and haphazard system of paving are avoided by the Act of 1912, which applies to everybody in like situation equally, and which leaves the Paving Commission free to determine upon and carry out a *comprehensive city-wide plan of improved paving,* putting on each street that kind of paving which is best adapted to the needs of travel on that particular street.

Every argument of convenience and policy from the standpoint of the public, and every argument of equality of treatment to the individual property owner, are in favor of the Paving Tax Act as compared with the system of special assessments by ordinance as it works out in practice.

The fundamental principle that justifies a special assessment, namely, that there is a benefit to the abutting property because of the public improvements made with the public funds in front of that property, also underlies and justifies the special Paving Tax Act.

It has been determined time and again, and is laid down by all the authorities, that the legislature can levy a tax founded upon a *past benefit* just as validly as upon a benefit to arise and be enjoyed after the passage of the Act.

This principle justifies the provision of the Act of 1912 which makes it apply to property abutting on streets theretofore paved with improved paving as well as to streets thereafter to be paved with improved paving entirely at the public expense.

Moreover, although the street may have been paved before the passage of the Act, and the benefit may have *begun* to accrue to the property before the passage of the Act, yet the *benefit is a continuing one* and the property abutting on streets theretofore paved with improved paving at the public expense is justly made subject to the operation of the Act, not only because a tax may be levied upon consideration of a past benefit, but *because of the benefit which is now enjoyed*

and which will continue to be enjoyed by such abutting property.

The tax imposed by the Act of 1912 does not affect any property unless its *present situation is that it abuts upon a public highway paved with improved paving.*

The Appeal Tax Court are to classify property for the paving tax; just as they do under the Act of 1908 with reference to classifications for the general tax in the Annex; *according to the condition of the street upon which that property abuts at the time when the Appeal Tax Court is called upon to act.* They classify only such property *as they may find to be abutting upon a public highway paved with improved paving,* at the public expense.

The Act therefore does not apply to any property abutting on a street which has been paved so long ago in the past that the paving is gone, it only applies *to property abutting on streets paved with improved paving where the paving is there now on the street at the public expense furnishing a present and continuing benefit to the abutting property.*

For both these reasons the Act in its application is supported by the same principle which underlies every assessment for street improvements, namely, the principle of benefit to the abutting property by the public improvements at the public expense.

II.

Power of the Legislature to Levy Special Taxes.

In 28 L. R. A. (N. S.) 1124, will be found an exhaustive note to the case of Chicago, M. & St. P. Ry. Co. vs. Janesville, 137 Wis. 7, dealing with the whole subject of special assessments.

I quote from that note under the present head of the power of the legislature to levy special assessments (28 L. R. A. [N. S.], 1127):

> "The power of the Legislature to impose special taxes for purely local improvements is, *like the power to impose taxes generally, plenary.*"
>
> * * * * * *
>
> "The power of apportionment of assessments for local improvements upon the property benefited, like the power of taxation, belongs exclusively to the Legislature, when not restricted by constitutional provisions limiting such imposts or prescribing a rule of apportionment."
>
> * * * * * *
>
> "It is not now debatable but that the Legislature may authorize the imposition of special assessments for special road or street improvements *at will.*"

NATURE OF THE POWER.

In 28 L. R. A. (N. S.), page 1129, it is said:

> "It is now quite generally conceded, said the Court in Allman vs. District of Columbia, 3 App. D. C. 8, that special assessments, though savoring in some measure of the exercise of the right of eminent domain, are nevertheless included in and governed generally *by the principles of the sovereign power of taxation.*"

LEGISLATURE HAS WIDE DISCRETION IN SELECTING AND CLASSIFYING THE PROPERTY TO BE MADE SUBJECT TO A SPECIAL TAX.

In 1st Cooley on Taxation, 3rd Ed., pages 76 and 77, the author says:

> "The power of the State to distinguish, select and classify objects of taxation has a wide range of discretion. Classification must be reasonable, but there is no precise application of the rule of reasonableness and there cannot be an exact exclusion or inclusion of persons and things."

Legislature may classify by districts territorially.

Annex Act, 1888, Ch. 98;
Daly vs. Morgan, 69 Md. 462;
Miller vs. Wicomico, 107 Md. 442.

May divide the real estate, *in the same territory, into two classes,* based upon the physical condition of the streets and the size of the blocks.

Foutz Act, 1902, Ch. 130;
Joesting Case, 97 Md.

May divide the real estate in the same territory into three classes, based upon the physical condition of improvement of the streets, and subject, one class to 65 cents, the second to $1.30 and the third to $2.01, for City purposes.

Act 1908, Ch. 286, page 581;
Sams vs. Fisher, 106 Md. 167.

May say that certain debts shall be *assessed* for taxes according to the amount of interest paid.

Bagby's Code, Art. 81, Sec. 207.

And that certain personal property shall pay only 30 cents for local purposes.

Bagby's Code, Art. 81, Sec. 214;
Frederick County vs. Frederick City, 88 Md. 654.

Can divide real estate, for the purposes of a paving tax, into two classes, one abutting on streets and the other abutting on lanes and alleys.

Act 1782, Ch. 17.

Or into six classes according to the width of the streets.

Act 1791, Ch. 59.

Or into three classes, as provided in the present Act.

The only limitation on this power is that the "classifications must not be arbitrary or unreasonable, but must rest upon some difference which *bears a reasonable and just relation* to the Act in respect to which the classification is proposed."

Luman vs. Hitchens, 90 Md. 25.

And in order to hold the exercise of the discretion to classify unreasonable, it must be "purely arbitrary, oppressive or capricious."

1 Cooley on Taxation, 3rd Ed. 78.

Or "plainly unequal, oppressive or unjust."

Gray on Limitation of Taxing Power, sec. 1440.

In Hagar vs. Reclamation Dist., 111 U. S. 705, this Court say:

> "All that is required in such cases is that the *charges shall be apportioned in some just and reasonable mode, according to the benefit received.* Absolute equality in imposing them may not be reached; only an approximation to it may be attainable. If no direct and invidious discrimination in favor of certain persons to the prejudice of others be made, it is not a valid objection to the mode pursued that, to some extent, inequalities may arise. * * * The rule of equality and uniformity prescribed in cases of taxation for State and county purposes, does not require that all property, or all persons in a county or district shall be taxed for local purposes. Such an application of the rule would often produce the very inequality it was designed to prevent."

The Court further say (111 U. S. 709):

> "Unless restrained by provisions of the Federal Constitution, the power of the State, as to the mode, form and extent of taxation, is unlimited, where the subjects to which it applies are within her jurisdiction. State

Tax on Foreign Held Bonds, 15 Wall. 300-319. Of the different kinds of taxes which the State may impose, there is a vast number of which, *from their nature, no notice can be given to the taxpayer,* nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and *generally, specific taxes* on things, or persons, or occupations. In such cases the Legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question, that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded."

LEGISLATURE HAS WIDE DISCRETION AS TO METHOD OF FIXING THE AMOUNT OF THE CHARGE ON EACH PROPERTY.

It may put a part, or the whole, *of the cost of the improvement* on the abutting property.

Alexander vs. Mayor and City Council, 5 Gill, 384;
Louisville vs. Barber, 197 U. S. 430;
Hyattsville vs. Smith, 105 Md. 318;
Bassett vs. Ocean City, 118 Md. 120.

May apportion the share of each lot by the front foot, or area, or value of lot, or value of lot and improvements.

Notes 28 L. R. A. (N. S.) 1159, 1160, 1161-2, 1178;
Balto. vs. Johns Hopkins Hospital, 56 Md. 32.

May levy the charge in *proportion to benefits,* leaving to some tribunal to decide what property is benefited and how much.

Notes 28 L. R. A. (N. S.) 1127.

Or the Legislature may, *itself,* decide *what property is benefited and the amount it is so benefited.*

Notes 28 L. R. A. (N. S.) 1151-2, 1153 and 1155-6;
L. & N. R. R. vs. Barber, 197 U. S. 433-4;
Spencer vs. Merchant, 125 U. S. 353.

Effect of Legislative Determination.

When the Act specifies the amount of the tax, it is a decision by the Legislature that the property affected is benefited to the amount of the tax, and, in the absence of a clear showing that the tax is arbitrary or oppressive, the legislative decision is conclusive on the courts.

Parsons vs. District, 170 U. S. 52;
Schendly vs. Alleghany, 25 Pa. St. 128;
Smith vs. Mayor, 182 Mass. 235;
Spencer vs. Merchant, 125 U. S. 353;
Mayor vs. Hopkins Hospital, 56 Md. 28;
Balto. vs. Hanson, 61 Md. 464;
Hyattsville vs. Smith, 105 Md. 323;
People vs. Mayor, 4 N. Y. 442, quoted and approved 2 Cooley, 1199 to 1201;
Notes to 28 L. R. A. (N. S.) 1151, 1152, 1153, 1155-6;
Louisville, &c., vs. Barber, 197 U. S. 433-4;
Bassett vs. Ocean City, 118 Md. 120.

When Notice Necessary.

Where the amount of the tax is left to be fixed by Commissioners, notice and an opportunity to be heard must be given, *but where the Legislature itself fixes the amount of the tax, no notice is necessary.*

Hagar vs. Reclamation Dist., 111 U. S. 701;
Spencer vs. Merchant, 125 U. S. 356;

Parsons vs. District, 170 U. S. 50-56;
Wight vs. Davidson, 181 U. S. 380-383;
Chicago vs. Janesville, 28 L. R. A. 1132-3.

In Parson vs. District, 170 U. S. 54, the Supreme Court say:

> "In Hagar vs. Reclamation District, 111 U. S. 701, the distinction between a tax or assessment imposed by a direct exercise of the legislative power, calling for no inquiry into the weight of evidence, nor for anything in the nature of judicial examination, and a tax or assessment imposed upon property according to its value to be ascertained by assessors upon evidence, was pointed out, and it was held that in the former case no notice to the owner is required, but that in the latter case the officers, in estimating the value, act judicially, and notice and an opportunity to be heard are necessary."

LEGISLATURE MAY PROVIDE A COMPREHENSIVE SCHEME OF PAVING AND LEVY A SPECIFIED TAX PER FRONT FOOT ON ABUTTING PROPERTY.

Instead of making improvements piecemeal and apportioning the *cost* of each piece on the abutting property, the Legislature may authorize a comprehensive plan of improvement and levy a specified tax per front foot on all the property reasonably related to such comprehensive plan.

Gray on Limitation of Taxing Power, secs. 1889, 1892, 1893;
Parsons vs. District, 170 U. S. 45;
People vs. Pitt, 169 N. Y. 521;
Chicago Ry. Co. vs. Janesville, 28 L. R. A. (N. S.) 1125.

The Legislature of Maryland has done so twice before.

Act 1782, Ch. 17 (2 Dorsey's Laws of Maryland, p. 1607);
Act 1791, Ch. 59 (2 Kilty's Laws of Maryland).

Referred to as valid Acts by Judge Miller in 56 Md. 33 and Balto. vs. Stewart, 92 Md. 552.

In Gray on Limitations of Taxing Power, section 1892, discussing local assessments, the author says:

> "The Legislature, or its subordinate legislative agencies having statutory authority, may treat an improvement or a *system of improvements, extending over a wide territory, as a whole, if there be any relation at all between the various parts of the system to justify the union.* An assessment for the cost of the *whole improvement*, considered as a unit, may be apportioned among all the property owners in the benefited district. *It is not necessary that the expense of improvements on one street or block be assessed on property near that street or block.* There is no doubt that the Legislature within the limits of reason, can group as one, the distinguishable elements of a public improvement."

That the tax on abutting property, under such comprehensive plan, exceeds its proportionate share of the *cost of that part of the improvement* in the street adjoining such property, does not render the tax void.

Parsons vs. District, 170 U. S. 52, 56, 57;
L. & N. R. R. vs. Barber, 197 U. S. 434;
Leominster vs. Conant, 139 Mass. 384.

May Incorporate Into Such General Plan an Improvement Previously Made, and Levy the Specified Tax on the Property Abutting Thereon.

Leominster vs. Conant, 139 Mass. 384, approved
Parsons vs. Dist., 170 U. S. 57.

In the above case a sewer was constructed adjacent to the property of Conant. At the time the sewer was constructed the town had the right by law to assess on the abutting prop-

erty a proportionate part of the cost of *constructing such sewer. After* the construction of this sewer, but before any assessment was actually levied upon Conant's property, the city *adopted a sewerage system,* and made specific front-foot assessments to cover the cost of the *whole system.* After the city adopted the sewerage system, it *incorporated in it this sewer which had been previously built,* and made a front-foot assessment on Conant's property which *exceeded his proportionate share of the cost of the sewer adjacent to his property,* and was considerably more than he could have been assessed for as the law stood at the time this sewer was built. But the Court upheld this larger front-foot assessment. The Court say (pages 386, 387):

> "The town had not, when the sewer was laid out, whether by the later or earlier order, or when it was built, adopted any system of sewerage, although it was then authorized to do so. Sts. 1878, Ch. 232, sec. 3; 1879, Ch. 55; Pub. Sts. Ch. 50, sec. 7. Before any assessment was laid, it did adopt such a system under the existing statute, which provided that assessments might be made upon the owners of estates, within the territory for which the system was adopted, by a fixed uniform rate, based upon the estimated average cost of all the sewers therein, according to the frontage of such estates on any street or way where a sewer is constructed. *The sum assessed to those whose estates abut on this sewer was more than the cost of this particular sewer, and the assessment was made under the system thus adopted. It was not for the proportionate part of the sewer which had been constructed, but according to the uniform rate which had been determined upon for the sewerage territory.* The tenant contends that this could not properly be done; that the liability to which his estate was subjected when the laying out took place was an encumbrance thereon for its proportional share of the expense of constructing that particular sewer; under the Gen. Sts. Ch. 48, sec. 4; St. 1878, Ch. 232, sec. 1; Pub. Sts. Ch. 50, sec. 4, which could not thereafter be increased or differently assessed by including

it in a sewerage territory *by a system subsequently adopted.* The liability to assessment is certainly an encumbrance upon the abutting estates when the sewer is laid out, although its amount cannot then be ascertained. Carr vs. Dooley, 119 Mass. 294. It is a liability to an assessment in any manner which may be lawfully adopted. As the law existed, the law might lawfully provide for a system of sewerage and prescribe the territory to which it should be applicable. *It could incorporate therein this sewer* territory and make the expense of constructing a part of the expense to be provided for under that system. If, before any assessment was made, it determined to adopt a general system, it might properly do so. Whatever system it might lawfully adopt, the tenant's estate was subjected to."

What was done in Leominster in regard to a sewerage system, the Acts of 1906 and 1912 have authorized in Baltimore in regard to a system of improved paving.

By the Act of 1906, Ch. 491, the Paving Commission was authorized to adopt a *comprehensive plan* for paving *all* the streets of Baltimore with improved paving, and *to incorporate into that plan existing improved pavements,* with repairs as needed; and the Act of 1912 levies a moderate tax on property abutting *on all the streets to be included in the comprehensive plan,* except where such property has already been subjected to a special charge for such improvement.

Special Tax or Assessment May be Levied After Improvement is Made.

In Gray on Limitation of Taxing Powers, the law is thus laid down, Section 2003:

"A special assessment may be levied for work which has been entirely or partly completed and paid for by

the city. As was said of a planking assessment, levied after the completion of the work: 'at the end the benefit was there on the ground at the city's expense. The principles of taxation are not those of contract. A special assessment may be levied upon an executed consideration, that is to say, for a public work already done.'"

See also—

Gray, sec. 1828, and cases in note 4;
Hall vs. Street Commissioners, 177 Mass. 434;
Warren vs. Commissioners, 187 Mass. 290, 291-292;
Chester vs. Pennell, 169 Pa. St. 300;
Gordon vs. Chicago, 201 Ill. 534;
Spencer vs. Merchant, 125 U. S. 346;
Seattle vs. Kelleher, 195 U. S. 351;
Hamilton on Special Assessments, sec. 823;
Balto. vs. Ulman, 79 Md. 482, affirmed in Mem. opinion, 165 U. S. 719;
Act 1782, Ch. 17;
2 Dorsey's Laws of Maryland, page 1607.

In Gray on Limitation of Taxing Power, sec. 128, it is said:

"Where the Constitution does not expressly forbid retrospective laws, the mere fact that a tax law is retrospective does not of itself render the law invalid, either as a violation of contract or a deprivation of property without due process; for, in the absence of other objections, *the legislature may make past facts the basis of its action,* as well as facts which have not yet occurred.

"Thus the Legislature may make facts which have occurred in the past the basis of present liability for taxes, as where the valuation of past years is taken as a basis of present assessment, *or where an improvement made in the past has been made the basis of a present special assessment.*"

MAY BE LEVIED THOUGH THE PROPERTY HAS CHANGED HANDS SINCE THE IMPROVEMENT.

28 L. R. A. (N. S.) 1169;
Seattle vs. Kelleher, 195 U. S. 351;
Spencer vs. Merchant, 125 U. S. 346.

In the Ulman case the work was done in 1887; the assessment on Mrs. Ulman was held void in 1890; a new Act was passed in 1892, and the new assessment was made in 1894—seven years after the work was done; but the precise question here discussed did not arise because the property before the Court had not changed hands.

In Spencer vs. Merchant, the second assessment was made ten years after the first (Compare 74 N. Y. 186 and 125 U. S. 349); and, presumably, some of the lots must have changed hands, but the question was not discussed. But, later, *the precise case arose of a sale to a bona fide purchaser for value, after the improvement and before the Act was passed levying the assessment*, and this Court decided that the doctrine of a *bona fide* purchaser without notice had no application, as every purchaser in legal contemplation is charged with notice of the power of the Legislature to impose a special burden on property enjoying a special benefit from a street improvement.

Seattle vs. Kelleher, 195 U. S. 360.

And see other cases to same effect in—

1 Cooley on Taxation, 3rd Ed., 527, Note 1;
Tallman vs. Janesville, 17 Wisc. 76.

That the Act may result in some inequalities does not affect its validity. Approximate equality is all that is attainable.

28 L. R. A. (N. S.) 1128, 1136;
Hager vs. Reclamation Dist., 111 U. S. 705;
People vs. Pitt, 169 N. Y. 528;
L. & N. R. R. Co. vs. Barber, 197 U. S. 433-4.

MAY LEVY THE TAX DIRECTLY.

Legislature has full power to levy a tax directly without any assessing agency.

Balto. vs. State, 105 Md. 7 to 9;
Faust vs. Bldg. Assn., 84 Md. 192-3;

Except as limited by the Constitution, the power of the legislature to tax is absolute.

Faust vs. Bldg. Assn., 84 Md. 192;
Chicago, etc., R. R. Co. vs. Janesville, and notes, 28 L. R. A. (N. S.), 1127-8 and 1135;
Alexander vs. Mayor and City Council, 5 Gill, 384;
Hyattsville vs. Smith, 105 Md. 323.

III.

STATUTE, PRESUMED TO BE VALID, CANNOT BE DECLARED VOID UNLESS IT VIOLATES SOME PROVISION OF THE CONSTITUTION—EVERY REASONABLE DOUBT RESOLVED IN ITS FAVOR.

In Cooley on Constitutional Limitations, 7th Ed., page 253, it is said:

> "A reasonable doubt must be solved in favor of the legislative action, and the Act be sustained."

On the same page, referring to Ogden vs. Saunders, 12 Wheaton, 269, Cooley says:

> "Mr. Justice Washington gives a reason for this rule, which has been repeatedly recognized in other cases which we have cited. After expressing the opinion that the particular question there presented, and which regarded the constitutionality of a State law, was involved in difficulty and doubt, he says: 'But if I could

rest my opinion in favor of the constitutionality of the law on which the question arises, on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt."

And concludes his discussion under that head, as follows, on pages 236-37:

"The rule of law upon this subject appears to be, that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the State, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but the courts can not assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It can not run a race of opinions upon points of right, reason and expediency with the lawmaking power. Any legislative act which does not encroach upon the powers apportioned to the other departments of the government, being *prima facie* valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the constitution, and the case shown to come within them."

In Sharpless vs. Phila., 21 Pa. St., pages 162 and 164, Black, Ch. J., said:

"There is nothing more easy than to imagine a thousand tyrannical things which the Legislature may do, if its members forget all their duties; disregard utterly

the obligations they owe to their constituents, and recklessly determine to trample upon right and justice. But to take away the power from the Legislature because they may abuse it, and give to the judges the right of controlling it, would not be advancing a single step, since the judges can be *imagined* to be as corrupt and as wicked as legislators. * * *

"I am thoroughly convinced that the words of the constitution furnish the only test to determine the validity of a statute, and that all arguments, based on general principles outside of the constitution, must be addressed to the people, and not to us. * * *

"There is another rule which must govern us in cases like this; namely, that we can declare an Act of Assembly void, only when it violates the constitution, *clearly, palpably, plainly;* and in such manner as to leave no *doubt* or hesitation on our minds. This principle is asserted by judges of every grade, both in the federal and in the state courts; and by some of them it is expressed with much solemnity of language."

IV.

Objections Made to the Validity of the Act of 1912, Chapter 688.

(A)

That the Act is Novel and Unique.

The learned Judge of the Circuit Court, in his opinion (Record, page 34), says:

> "The provision under consideration is a novel one; unique in the law, so far as I have found, except for a somewhat similar provision pointed out by the City Solicitor in an Act of the Maryland Legislature of 1782."

Disregarding, for the moment, the exception dismissed by the Court below with this casual reference, what does this objection amount to? No one will say that the law is unconstitutional because it is *new;* because the Legislature never passed exactly that kind of a law before. There is no provision in the Constitution which says that a law shall be void because it is new. Such a position would bar all progress in legislation. Not very long ago Congress passed an Act creating the Interstate Commerce Commission, and giving said Commission large powers. It was remedial and beneficial legislation and its validity is unquestioned; but the Act when passed was "a novel one; unique in the law."

By the Annexation Act of 1888 the territory of Baltimore was enlarged, and the Act provided that the real estate in the Annex until 1900 should be assessed for City purposes at only 60 cents; real estate in the balance of the City paid, during all that time, approaching $1.90. The Annexation Act in this particular, so far as Maryland was concerned, was new; the Legislature of Maryland had never passed such a law before; but it was held valid.

By the Act of 1910 the Legislature established a Public Service Commission, at very considerable expense and with very large powers. The validity of this Act has not been successfully challenged, and yet when it was passed, so far as Maryland was concerned, the Act was new; and, indeed, it has not been very long since the first Act of that kind was passed; when such legislation was without any precedent.

It is apparent, therefore, that the fact that an Act is new does not at all indicate that it is unconstitutional. The Act of 1912 having been duly passed by the Legislature in the exercise of its plenary power to lay taxes, either general or special, cannot be set aside simply because it is new; and yet a reading of the opinion of the Court below seems to indicate that this thought, that the Act was "novel" and "unique,"

had an important effect upon the conclusion to which the learned Judge came. Having stated, on page 34, that this provision was novel and unique, his Honor proceeded to quote, on page 35, the definition given by Page & Jones of a "local assessment," and also, on pages 35 and 36, to quote extracts from what was said by the Court of Appeals in reference to the special assessments which were before the Court, in the several cases referred to; and then his Honor comes to the conclusion, on page 36, that the special paving tax provided by the Act of 1912 does *not exactly fit the definition* of a local assessment given by Page and Jones and what had been said about certain assessments, by the Court of Appeals, in the cases referred to. His Honor says (Record, page 36):

> "Clearly I think the special assessment provided for under the Act of 1912 is not such as has just been described."

In the definition quoted by his Honor, Page & Jones were defining the ordinary and familiar *assessment made by Ordinance; they were not attempting to give a definition which would comprehend every Act levying a special tax which a Legislature has power to pass.* Similarly, the Court of Appeals in the cases referred to were discussing *special assessments which had been levied by ordinances,* and were not at all discussing the question of the *power of the Legislature* to levy a special tax. If, therefore, the special tax levied by the Act of 1912 does not exactly fit the definition of a "local assessment" given by Page & Jones, or the descriptions of special assessments before the Court of Appeals in the cases referred to, that does not show, or tend to show, that the Act of 1912 violates any provision of the Constitution. If it does not violate some provision of the Constitution, it is valid, for the Legislature has plenary power to levy special taxes, subject only to limitations prescribed by the Constitution.

Not Novel or Unique.

But the learned Court below was in error in saying that this Act is "a novel one, unique in the law"; indeed, the *exception to which he referred clearly overthrows his statement, since the Act of* 1782 *referred to by him was an exactly similar Act.* Not only was a similar Act passed in 1782, but another similar Act was passed in 1791; Acts based upon the same principle have been passed by Congress and by the *Legislatures of New York, Massachusetts* and other States, and the same principle underlies the many Acts in force in this and other States, authorizing assessments to be made for paving on property abutting on streets paved with improved paving long after the paving was laid, where an abortive attempt had been made to levy an assessment at the time the paving was done.

By the Act of 1782, Chapter 17, 2 Dorsey's Laws of Maryland, page 1607, a tax was levied—

> "* * * towards paving, cleansing and keeping in repair, the streets, lanes and alleys, and for mending, building and keeping in repair the bridges within the said town, viz: On every foot front of improved and unimproved lots in those parts of the streets fixed *on to be paved, or that may have been already paved,* by the special commissioners appointed by an act, entitled an Act for the speedy application of the money appropriated for repairing the streets in Baltimore town, in Baltimore county; that is to say, twelve shillings and six-pence; and on every foot front of improved and unimproved lots in those parts of the lanes and alleys *paved or to be paved,* six shillings and three-pence; * * *."

By the Act of 1791, Chapter 59, 2 Kilty's Laws of Maryland, under that date and chapter, the division of streets into two classes, as provided in the Act of 1782, was repealed and the following provision was made:

"II. *Be it enacted by the General Assembly of Maryland,* That for every street eighty-five feet wide or upwards, a tax not exceeding twelve shillings and six-pence per foot fronting on the said street, and for every street seventy-five feet wide and less than eighty-five, a tax not exceeding eleven shillings and three-pence for every foot on said street, and for every street sixty feet wide and less than seventy-five feet, a tax not exceeding ten shillings per foot fronting on the said street, and for every street forty feet wide and less than sixty feet, a tax not exceeding eight shillings and four pence per foot fronting on the said street, and for every street, lane or alley of twenty-five feet and less than forty feet, a tax not exceeding six shillings and three-pence per foot fronting on the same, and for every street, lane or alley under twenty-five feet, a tax not exceeding four shillings per foot on every foot fronting the same, is hereby laid and imposed, and shall and may be levied and collected by the commissioners aforesaid in the manner and according to the act entitled, an Act for the more effectual paving the streets of Baltimore town, in Baltimore county, and for other purposes, passed November Session, seventeen hundred and eighty-two."

These two Acts are exactly similar to the Act of 1912, Chapter 688, in reference to the provision which the learned Judge below considers "novel" and "unique." They both levy—

(1) A special tax;

(2) By the front-foot rule;

(3) On streets *"heretofore paved and hereafter to be paved";*

(4) And the proceeds of the tax were to go into a general fund for paving and repairing the streets. Neither in the Act of 1782, nor in the Act of 1791, was there any relation *stated* between the cost of the improvement on a particular street and the amount of the tax on the property abutting on that street; nor was there any direction that the money

raised by the tax from property on one street should be spent on that street—on the contrary, the money was directed to go into a general fund for the general scheme of street improvements provided for in a proir Act.

The Act of 1782, Chapter 17, remained in force for nine years, until modified by the Act of 1791, Chapter 59, and as modified, remained in force until 1797. During these fifteen years the paving taxes of a specified amount per front foot on property abutting on streets *"fixed on to be paved or that may have already been paved,"* was paid and the validity of the law was never even questioned, so far as I have been able to find. On the contrary, this old Act of 1782, which cannot be distinguished from the Act of 1912, has been referred to by the Court of Appeals in terms that leave no doubt that it was considered by that Court a valid law.

In Baltimore vs. Johns Hopkins Hospital, 56 Md. on page 32, Judge Miller, discussing the front-foot rule, said:

> "It is conceded, on all sides, to be the province of the Legislature to prescribe, in such cases, how the apportionment shall be made, and this may be either by the front foot, by the area of the fronting lots, or by their value, including or excluding the buildings upon them."

Then after quoting Cooley on Taxation, Judge Miller further says (pages 32 and 33):

> "In Baltimore the rule has prevailed, been acted upon, and acquiesced in without question or complaint, from the foundation of the city to the present time, but not always under an express provision of an Act of the General Assembly to that effect. Prior to the incorporation of the city, taxes were imposed upon the inhabitants of the town, directly by the Legislature, and by the Act of 1782, Ch. 17 (November Session), among other taxes for paving, cleansing and keeping the streets in repair, a tax of twelve shillings and six-pence was levied 'on every front foot of improved and unimproved

> lots, in those parts of the streets fixed on to be paved, or that may have been already paved by the Special Commissioners.' Afterwards, upon representation by the Commissioners that this tax operated unequally and oppressively, because one and the same rate was fixed 'for streets of different widths,' the Legislature, by the Act of 1791, Ch. 59, changed it as desired, and prescribed different rates per front foot, according to the width of the street."

In Baltimore City vs. Stewart, 92 Md. on page 552, this Court, by McSherry, Chief Judge, said:

> "Now, as to the front-foot rule of apportionment of the cost of the improvement. Prior to the Act of 1874, Ch. 218, the front-foot rule was prescribed by statute and this had prevailed between 1782 and 1860 under various Acts of Assembly, and in 1860 until 1874 under secs. 845 and 847, Art. 4, Code Public Local Laws. The repeal of these last-named sections, by the Act of 1874, abrogated this rule of apportionment so far forth as it had been established by legislative enactment, but no further, whilst the Act of 1874 gave to the city an unqualified discretion to adopt by ordinance the same or any other rule by which to ascertain the amount to be paid by each abutting proprietor."

See also opinion of Court of Appeals in this case (Record, p. 48).

The statement by Chief Judge McSherry that the front-foot rule was prescribed by statute and *had prevailed* from 1782 to 1860 under various Acts, is, of course, a reference to the Act of 1782, Chapter 17, and a statement that that Act was valid.

We have, therefore, two prior Acts of the Maryland Legislature exactly like the Act of 1912 on the points as to which the latter Act is assailed, and therefore the learned Court below fell into a manifest error in declaring that the Act of 1912 is novel and unique.

By the Act of 1892, Chapter 284, which is now found in the Baltimore City Code of 1906, Art. 6, page 77, the City was authorized to—

> "In any and all cases where any street, lane or alley, or any part thereof, in the city, has been graded, paved or curbed, or re-graded, re-paved or re-curbed, under any ordinance which provided for assessing the whole or any portion of the cost of such improvement upon the property binding upon such street, lane or alley, or part thereof, and such assessments or any part thereof remain unpaid, it shall be lawful for the city to provide by ordinance for the levy and collection, in such manner as it may deem proper, of a tax upon all the property binding on any street, lane or alley, or part thereof, which may have been so improved, to the extent that such property shall have been specially benefited by such improvement, provided that no property upon which the assessment originally made for its share of the cost of such improvement shall have been paid shall be again assessed. * * *"

Under this Act the City passed an ordinance, and, under it, levied an assessment on Mrs. Ulman amounting to $6,050.00, on account of the paving of North avenue, on which street her property abutted, which had been paved and paid for *seven years* before the assessment was laid. This assessment was sustained in Baltimore vs. Ulman, 79 Md. 469, which was affirmed in Ulman vs. Baltimore, 165 U. S. 719.

Similar Acts exist in many states, and have been uniformly approved. The only difference between the Act of 1892 and the present Special Paving Tax Act is that the Act of 1892 only authorized the City to levy assessments on account of paving where an attempt had been made to levy an assessment at the time the paving was laid. Under that Act, of course, the *City* could not, by ordinance, levy an assessment on property abutting on a paved street where no attempt had been made to levy an assessment at the time the street was

paved; *not because there would be any violation of the Constitution by doing so, but because the Act of the Legislature does not authorize the City to do so. A City,* by ordinance, cannot levy any assessment *unless and except in the cases authorized by the Act of the Legislature,* but the *Legislature can levy any special tax it sees fit to levy unless forbidden to do so by some provision of the Constitution.*

No Distinction in Reason.

There is no reason why the Legislature may not levy a special paving tax on property abutting on a street paved with improved paving, where no attempt was made to levy an assessment at the time the paving was laid, just as well as in the cases where such an attempt was made. In either case there is the same expense to the public of constructing the pavement and there is the same benefit to the abutting property, and, therefore, there is the same justification for a tax in the one case as in the other.

Supported by Authority.

That the Legislature can levy a special tax on account of an improvement previously made and where, at the time the improvement was made, there was no attempt to levy an assessment, has been expressly decided by the highest authority—

Kelleher vs. City of Seattle, 195 U. S. 351.

The facts in this case were as follows:

In 1890 the City of Seattle passed an ordinance that Weller street be graded to Jackson street addition, and that sidewalks be constructed on both sides of it co-extensive with the grade. The opening and grading extended in part through the land of one Hill. The city also paved the street

with planks, but the planking stopped about 1,000 feet before reaching Hill's tract. Then an assessment was levied for the *opening and grading, there being, at that time, no law authorizing an assessment for the planking.* The assessment was held void. In 1892 Hill sold his land to one Kelleher, who was a non-resident. In 1893 there was a new Act passed and an ordinance providing for an assessment for the opening and grading and *also for the planking,* which resulted in an assessment of $14,262.68 on the tract belonging to Kelleher, which, at the time the work was done, belonged to Hill. Kelleher's land was "charged 44% under the present plan, whereas, under the one in force when the improvement was made he would have been charged only 32%." The Supreme Court said (195 U. S. 357-358):

> "The main ground of argument is that the planking could not be included in the assessment. The reasons, as summed up by the Circuit Court, are that the law in force at the time of doing the work did not authorize a charge for planking upon the abutting property, that the Ordinance No. 1285, ordering the improvement, did not authorize any planking, that the City could assess only the land abutting on the improvement, and the plaintiff's land was far away from the planking, and that such an assessment of the whole cost, including the planking, on the property on Weller street, is absolutely unfair as to the plaintiff's land."

Answering this argument, the Supreme Court said (195 U. S. 359):

> "If, as is said, planking was not authorized under the word 'sidewalks' in Ordinance No. 1285, the city has done or adopted the work and presumably has paid for it. At the end, the benefit was there, on the ground, at the city's expense. The principles of taxation are not those of contract. A special assessment may be levied upon an executed consideration, that is to say, for a public work already done. Bellows vs. Weeks, 41 Vermont, 590, 599, 600; Mills vs. Charleton, 29 Wisconsin, 400, 413; Hall vs. Street Commissioners, 177

Mass. 434, 439. If this were not so it might be hard to justify re-assessments. See Norwood vs. Baker, 172 U. S. 269, 293; Williams vs. Supervisors of Albany, 122 U. S. 154; Frederick vs. Seattle, 13 Wash. 428; Cline vs. Seattle, 13 Wash. 444; Bacon vs. Seattle, 15 Washington, 701; Cooley, Taxation, 3rd Ed. 1280. The same answer is sufficient if it be true that when the work was done the cost of planking could not be included in the special assessment, which again depends on the meaning of the words 'sidewalk' and 'pave' in the old Charter 8, taken with the special provisions for planking in 7. Laws of 1885-1886, pages 238, 241. The charge of planking on the general taxes was not a contract with the landowners, and no more prevented a special assessment being authorized for it later than silence of the laws at the same time as to how it should be paid for would have. In either case the Legislature could do as it thought best."

Here, therefore, is an explicit decision that the fact that an improvement is made and paid for out of the general levy, without any attempt to charge an assessment at the time, does not prevent the Legislature afterward from levying an assessment. This being the only point of distinction between the Act of 1892 and the present Act, the Act of 1892 is also a precedent in principle for the Act of 1912, Chapter 688.

(B)

OBJECTION THAT THE TAX LEVIED HAS NO REFERENCE TO THE COST OF THE IMPROVEMENT ON THE ADJOINING STREET.

In support of his conclusion that the special paving tax, provided by the Act of 1912, does not come within the definition in Clark and Jones, the Court below said:

"It has no reference to the cost of the improvements made near the properties charged."

This contention is urged in brief for plaintiff in error, pp. 12 *et seq.*

If the Court meant by this that the *amount* of the tax bears no reference to the *amount* of the cost of the improvements, the statement is erroneous; for while the Act does not say, in so many words, that the amount of the tax is less, on any particular piece of property, than its proportionate share of the cost of the paving on the street in front of that property, the *Act does specify the exact amount of the tax, and, the fact is, that that amount is less than the property would have to pay if it were charged with a proportionate part of the cost of the paving on the street adjoining such property.* Take, for example, the properties mentioned in the Bill; "seven two-story dwelling houses situated on the southeast side of the Philadelphia Road"—Record, page 3. "The houses are 12 feet front and the street is 40 feet wide" —Record, page 16—"and paved with vitrified block, without any expense to the abutting owners"—Record, page 3.

To pave 12 feet of that street, 40 feet wide, with vitrified blocks, required a little over 53 square yards of paving, which cost about $2.10 per sq. yd., or a total of $112.00, exclusive of the cost of the grading and curbing, which would add considerably to this amount; assessing one-third of this amount on the abutting property owners on each side, the charge would be $37.66, or, if you count in the curbing, not less than $40.00 per house.

The special paving tax on each of these houses is 15c. per front foot, or, $1.80 per year—for ten years a total of $18.00.

If the *entire* cost of the paving had been assessed on the abutting property, which is confessedly legal, the burden on each house, under an assessment of the cost, would have been about $60.00 per house. In the more expensive belgian block and wood block paving, the discrepancy between the amount of the paving tax and the property's proportionate

share of the cost of the improvement would be greater—and with less expensive paving, such as asphalt, bituminous concrete, or bituminous macadam, the discrepancy would not be quite so great—but I assert, as the result of careful calculations, and, without fear of contradiction, *that the amount of the paving tax on any property in Baltimore City, on any street, will be less than such property's proportionate share of the cost of paving that street with any improved paving specified in the Act.*

The amount of the tax is fixed, the amount of the cost of paving the street in front of any property is easily ascertained; it can be fixed; *Id certum est quod certum reddi potest.* This Court will not assume that the tax is greater than the cost of the improvement. When the amount of the tax is fixed by the Act, and the *amount of the cost of the improvement could be alleged and proved with definiteness,* this Court will presume the validity of the Act. If its invalidity can be made to appear by a fact outside of the Act, it is incumbent on those who assail the Act to allege and prove that fact. People vs. Mayor, 4 N. Y. 442, quoted with approval, 2 Cooley on Tax., 3rd Ed., 1200. In this connection I beg to call the attention of the Court to the fact that neither in the Bill, as originally filed, nor in the seventh paragraph of the petition of the Safe Deposit and Trust Company, which, with an amendment is, by stipulation, made a part of the Bill (see the Agreement, Record, page 40), is there any allegation that the amount of the tax on any property will be greater than such property's proportionate share of the cost of the improvement.

In People vs. Mayor, 4 N. Y. 442, the Court say:

> "The burden of showing that the tax was excessive and exorbitant lay upon the relators and this should have been done at the proper time and place."

(C)

Objection That the Proceeds of the Tax on Property Abutting on One Street Are Not Required to be Used on That Street, but Go Into a General Fund, and May be Used on Some Other Street.

The Court below in his opinion on this point says (Record, pages 36-37):

> "And, lastly, it is not at all an exaction to defray the cost of the old improvements, for according to the terms of the Act, those were paid for by a general levy, and the transactions thus closed. On the contrary, the whole purpose of this provision of the Statute is to raise a fund for present uses, alien to these properties altogether—except as they may share in a benefit common to the whole city."

This contention is made in Brief for Plaintiff in Error, page 13 *et seq.*

While we submit that this statement is not accurate, because the proceeds of the tax are to go into a general fund to be used for a complete system of paving, which is to include every street in the city; yet we beg the Court's attention to the fact that what his Honor Judge Bond said, as just above quoted, could have been correctly said, *every word of it*, about the Ordinance authorizing an assessment upon Mrs. Ulman, which was sustained by the Court of Appeals in

Baltimore vs. Ulman, 79 Md. 469.

The paving had been done and paid for in 1887. Under an Act passed in 1892 and an Ordinance in 1893, an assessment was made upon Mrs. Ulman *seven years after the street upon which her property abutted had been constructed and paid for*, and the assessment laid upon Mrs. Ulman simply went into the general funds of the City, to be spent for any purpose for which the City might choose to spend it.

Judge Niles (who was counsel for the Safe Deposit Company which has not appealed to this Court) in the argument below stated the same objection in this way. He said:

> "You may tax property abutting on the Philadelphia Road to pay for paving on the Philadelphia Road, but you cannot tax property abutting on the Philadelphia Road to pay for paving on Preston street."

This sounds forcible, but a little reflection will clearly show that there are complete answers to it:

1. Act of 1912, Chapter 688, does not tax the property on one street to raise money to spend in paving another street but to raise money to go into a general fund for a comprehensive system of paving all the streets of the City; into which system every street, as to which the tax applies, is to be incorporated, and from which fund the streets paved before the passage of the Act will be repaired or repaved if they need be.

Compare the last part of Section 2 of the Act of 1912 with Section 2 of the Act of 1906, Chapter 401, and Act of 1908, Chapter 202, Section 2, paragraph 4, page 646.

2. THE VERY THING WHICH COUNSEL SAID COULD NOT BE DONE HAS BEEN DONE TIME AND TIME AGAIN.

The Legislature has, time and time again, taxed property on one street to raise money to be spent in paving some other street.

The Philadelphia Road, on which the property represented by Messrs. Richardson and Williams abuts, was paved almost entirely with money raised by taxes on property on other streets.

For years, from time to time, money has been raised by taxes on property which was and still is on cobble stone streets, to pave, with improved paving, other streets. But when it is proposed to make the property which has been,

and still is enjoying the benefit of improved pavement, paid for chiefly by property on cobble stone streets, pay a small—a very small—return for the benefit received and *now enjoyed,* it is said to be unconstitutional, if what is so paid is to be spent on the cobble stone streets.

(*a*)

The Legislature can tax carriages and raise money to repair streets.

Mason vs. Cumberland, 92 Md. 451, 463;
Baltimore City Code, page 47, title "Carriages."

(*b*)

Can raise money from automobiles and use it to build roads, where the automobiles may never go.

Bagby's Code, Art. 56, Sec. 159.

(*c*)

Can assess the entire cost of paving on abutting owners and use the money to pave other streets.

Act 1908, Ch. 202, sec. 2, page 645;
Act 1892, Ch. 284—see preamble.

(*d*)

The Legislature could, more than one hundred years ago, raise a general fund for street paving by a front-foot tax on streets *paved and to be paved.*

Act 1782, Ch. 17.

(*e*)

Years after the paving is laid and *paid for,* by a law passed after the paving is done, money may be collected from abutting owners and used elsewhere.

Balto. vs. Ulman, 79 Md. 469;
Spencer vs. Merchant, 125 U. S.

(*f*)

And it would seem to follow that in 1912 it could levy a small tax on all property enjoying the advantage of abutting on streets paved with improved pavements, to augment a fund devoted to a comprehensive system of improved paving throughout the City.

3. Authorities Cited by Counsel for Plaintiffs in Error.

The case chiefly relied upon on this point by Plaintiffs in Error is the case of Norwood vs. Baker, 172 U. S. 269. They quote from this case in their brief, page 13:

> "An assessment laid on property along a city street for an improvement made in another street in a distant part of the same city would be universally condemned, both on moral and legal grounds."

(*a*) The attempt to apply that extract to the present case depends upon the meaning you give to the word "for." Counsel for Plaintiffs in Error construe the word "for" as referring to the use to be made of the proceeds of the tax. We submit that the word "for" naturally refers to the *reason* or *justification* for levying the tax. In this case the special paving tax is not laid *for* an improvement on another street; it is laid *for;* that is, *on account of, or because of;* the pavement on the street immediately in front of the property taxed. *That pavement in front of the property taxed, put there at the general expense and furnishing a present and continuing benefit to the abutting property, is the justification for the paving tax.*

(*b*) Of Norwood vs. Baker, Gray on Limitation of Taxing Power, sec. 1963, says:

> "The rules in some of the state courts, interpreting the due process of law clauses in the state constitutions, have been somewhat unsettled since the United States

Supreme Court disturbed the course of events by the decision in Norwood vs. Baker, and then attempted to restore the former stage of things by the decision in French vs. Barber Asphalt Paving Co."

(*c*) On page 1147, 28 L. R. A. (N. S.), the annotator quotes from Cass Farm Co. vs. Detroit, 124 Mich. 433, which distinguishes the case of Norwood vs. Baker on the ground that it was a *street opening* case and not a *paving* case. This decision of the Michigan Supreme Court was affirmed in 181 U. S. 396, and the distinction made by the Michigan Court quoted.

There is a clear distinction between a *street opening case* which involves the *taking of property,* and the principles of the power of *eminent domain;* and the Act in question which *levies a tax* on account of a benefit conferred by paving a street, and involves the *taxing power.*

Norwood vs. Baker did not deal with a paving tax, but with the *taking of private property* for opening a street.

Levying a tax on property is not a *taking of* property.

Wight vs. Davidson, 181 U. S. 385;
French vs. Barber Asphalt Co., 181 U. S. 324, 337 to 345;
Louisville vs. Barber, 197 U. S. 430;
Gray on Lim. Taxing Power, sec. 1963;
28 L. R. A. (New Series), 1145, 1146 and 1149;
Chadwick vs. Kelley, 187 U. S. 543-4.

(*d*) In Jelliff vs. Newark, 48 N. J. Law, 102, the sixth and seventh objections on page 104 are as follows:

"Sixth. Because said improvement is a general and not a local improvement, and was so regarded by the common council of said city, which provided for paving for the same by a general tax.

"Seventh. Because the Act of March 27th, 1892, entitled 'An Act relating to the improvement of streets

and construction of sewers in the cities of this State,' under which this assessment may be sought to be sustained, in whole or in part, is unconstitutional, in so far as it directs that the moneys derived from the assessment for special benefits shall be applied, not to pay for the improvement in respect of which such assessment is levied, but that such moneys shall be set aside to be used as a fund to pay for other similar improvements, by which the individuals called on to contribute to said fund may not be specially benefited; and because the said Act is in other respects unconstitutional and void."

The Court answers the objections on page 108, as follows:

"The Sixth reason rests on a *non sequitur*. By paying for the improvement out of a fund raised by general tax, the common council simply followed the Act of March 27th, 1882, and did not intimate that the repavement would result in no special benefit.

"The Seventh reason does not fairly present the plan of the Act of 1882. That plan was, first, to raise money by general tax for improving streets and building sewers. These were undoubtedly municipal objects for which the city might levy a general tax. Second, to spend this money for the purposes designated. Third, to reimburse the city, so far as special benefits would warrant, by special assessments. This power is constantly exercised; for while the greater part of the expense of street improvements is met by money borrowed by the cities, some of it, probably in every instance, is advanced by the city, either in the original expenditure, or in payment of loans before the special *reimbursement in making other street improvements. This last is the feature at which the objection is aimed.* assessment is levied. *Fourth, to use the proceeds of and yet, it is manifest that if the city has met the cost of the first improvement before the assessment therefor is collected, the money realized from the assessment must be devoted to some object other than the improvement.* Whether that object shall be indicated by the city itself, or by the legislature, is purely a matter of

> legislative discretion, at least so long as the object is within the due scope of local government. To adjudge this scheme invalid, and to hold that a special assessment can be levied and collected only while and so far as the expense of the improvement remains unpaid by the city, and that the proceeds of assessment cannot be used for any other municipal object, would be inconsistent with our whole course of legislation and decision on this topic hitherto."

In his brief, filed in the Court below, Judge Niles admitted that a special tax or assessment, on account of the paving of a street, could be levied after the street had been paved and paid for by the City. He was obliged to admit this because the assessment upon Mrs. Ulman which was sustained by this Court was made seven years after the paving of the adjoining street had been laid and paid for by the City and under a law passed after the paving was laid and paid for.

Baltimore vs. Ulman, 79 Md. 469, affirmed 165 U. S. 719.

But Judge Niles contended that the assessment in the Ulman case was valid *because the proceeds went into the general funds of the City,* to reimburse the City for what it had paid for the paving; and he contended that the Act of 1912 is void, as to property abutting on streets paved before the passage of the Act, because the proceeds of the tax levied by the Act of 1912 are not to go into the general funds of the City, but are to be kept separate and used by the Paving Commission to carry out its system of improved paving throughout the City. No reason was suggested by him why the validity of the tax should depend upon the use which the City makes of the money realized from the tax. *The validity of the tax, in reason it would seem, depends upon the fact of benefit or additional value conferred upon the abutting property by the improvement at the public expense.*

This reason exists just as fully where the City keeps the money realized from the tax separate, and uses it for paving, as where the City puts the money in its general funds to be used for the general expenses of the City government. Indeed, this Court clearly indicated that the fact that the proceeds of a local tax, levied because of the benefit conferred by a public improvement, were *not to be used for the ordinary expenses* of the government, but were to be used solely for the construction and maintenance of the entire public improvement to which the tax was related, was an argument in favor of the validity of the tax. In referring to a tax of $1.25 per front foot upon the abutting property on each side, or $2.50 altogether, on account of the laying of water mains in a street where it was proven that the cost of laying the mains was only $1.50 per foot, this Court said—170 U. S. 57:

> "The moneys raised beyond the expense of laying the pipe are not paid into the general treasury of the District, but are set aside to maintain and repair the system; and there is no such disproportion between the amount assessed and the actual cost as to show any abuse of legislative power."

In reason it would seem that, if the adjoining property is benefited by an improvement made at the public expense, and a local tax is levied by reason thereof, the owner of the property is not concerned with what is done with the money realized from the tax, *so long as it is used for a public purpose; his benefit is the same, the expense to the public in making the improvement which confers that benefit on him is the same, and the amount of the tax he pays is the same,* whether the proceeds of the tax be used to pay the salaries of City employees or for paving a street.

Appellee's contention on this point confuses two different things:

(*a*) The fact that justifies the tax, and,

(*b*) The use of the proceeds of the tax.

The fact that justifies the tax is the existence of the improvement made at public expense benefiting the taxpayer's property. If his contribution is justified by the fact of the existence of a local improvement benefiting his property, it cannot possibly make any difference to him whether the particular money he contributes is spent on a street in front of his property or on some other street.

The present tax is justified, just as in the Ulman case, not only because the City has spent money in the past on the street on which the taxpayer's property abuts, but it is also justified on the ground that the benefit is there now, a continuing one. The improved pavement is there and the City is bound to maintain it as an improved pavement. The City could not, if it desired, take up the improved pavement and put down cobble stones.

4 Dillon, 5th Ed., 1710;
25 Enc. of Law, 2nd Ed., 1179;
Baltimore City Code, Art. 35, section 77.

The City must, therefore, keep that street in repair as an improved paved street, and that is a continuing benefit to the property owner practically as much as if the pavement were laid this year or last year. At any rate, it is certainly a benefit greater than the amount of the tax levied in this proceeding.

(4)

The Act of 1912 is supported by ample precedent and authority.

Act 1782, Ch. 17;
Act 1791, Ch. 59, referred to as valid laws in Balto. vs. Johns Hopkins, 56 Md. 33, and Stuart vs. Baltimore, 92 Md. 552;
Leominster vs. Conant, 139 Mass. 386-7;

Gray on Limitation of the Taxing Power, sections 1889-1892-1893;
Parsons vs. District, 170 U. S. 45;
People vs. Pitt, 169 N. Y. 521.

(D)

CONTENTION THAT IF, AT THE TIME THE PAVING IS LAID, NO ASSESSMENT IS ATTEMPTED, NO ASSESSMENT OR TAX CAN SUBSEQUENTLY BE LAID.

They say that if the Council tries to make an assessment at the time the paving is done, though the ordinance is void, a valid assessment can subsequently be made, but if the ordinance, in the first instance, provides for paving a street out of the general levy, no tax or assessment can subsequently be levied.

This contention was, of course, forced upon counsel by the necessity of trying to distinguish the case of Baltimore vs. Ulman, 79 Md.

There is no reason in support of such a distinction.

The authorities lay down the proposition broadly that a tax may be based upon a past consideration; that a *local tax or assessment may be levied for an improvement previously made and paid for;* without making any distinction as to whether or not a previous abortive attempt to tax had been made. And the precise point here urged has been previously decided by the Court of Appeals of New Jersey and by this Court against the contention made by the appellee.

Seattle vs. Kelleher, 195 U. S. 359;
Hamilton on Special Assts., Sec. 823;
Leominster vs. Conant, 139 Mass. 386-7;
1 Cooley on Taxation, 492;
Gray on Limitation of Taxing Power, Sec. 2003;
1 Page and Jones on Ass., Sec. 416;
Jelliff vs. Newark, 48 N. J. L. 102.

In the case of Seattle vs. Kelleher, 195 U. S., this precise point arose, was discussed and decided, the Court saying, page 359:

> "The charge of planking on the general taxes was not a contract with the landowners and no more prevented a special assessment being authorized for it later than silence of the laws at the same time as to how it should be paid for would have."

In Gray on Limitation of Taxing Power, Section 2003, it is said:

> "A special assessment may be levied for work which has been entirely or partly completed and paid for by the city."

In Hamilton on Special Assessment, Section 823, speaking of levying a special assessment, the author said:

> "It may be levied for work already done, or for work unauthorized when improvements are constructed, and such authorization is not a denial of due process of law."

Counsel for plaintiff in error quote a number of cases in favor of the proposition stated in 25 Am. & Eng. Encyc. of Law, 1176, as quoted on their brief, page 15:

> "Where the municipality has discretion as to whether a local improvement shall be paid for by special assessment or by general taxation, it cannot, after the improvement has been made, levy special assessment therefor."

But this statement itself refers to what "it," that is, what *the City* can do. It deals with the power, not of the Legislature, but of the municipality. All the cases cited deal with the same question and turn upon the grant of power made by the Legislature to the City. The City cannot levy any special assessment without authority from the Legislature. All the authorities cited by counsel for plaintiff in

error simply hold that the City cannot levy an assessment after an improvement is made, where the Legislature has not given it the power to do so. The distinction between what a city can do, which is determined by the grant of power from the Legislature, and what a Legislature may do, which involves the very wide legislative power of taxation, is more fully considered below.

In 1st Page & Jones on Taxation by Assessment, Sec. 407, the doctrine laid down by the Supreme Court in

Seattle vs. Kelleher, 195 U. S.,

is quoted, and in the notes to Sections 407 and 408 decisions are quoted from Illinois, Massachusetts, Mississippi, New Jersey, New York, Vermont, Wisconsin, Washington and Ohio in favor of the doctrine laid down by the Supreme Court.

In Section 409 cases are cited holding assessment for past improvements invalid, but the author points out that these cases were assessments made by the *City* and not by the Legislature and, therefore, involved the *question of the construction of the Statute giving the power to the City, and not the constitutional question of the power of the Legislature.*

In the matter of Lands in Flatbush, 60 N. Y. 398, which is quoted by the Court below in this case on page 37 of the Record, and in the Brief for Plaintiff in Error, p. 17. This case is also quoted in note 4 of Section 409 of 1st Page & Jones on Taxation by Assessment.

Referring to this and similar cases, the authors say:

> "In these cases, however, the Legislature had not authorized such assessment. Constitutional questions were not involved."

In 1 Page & Jones on Taxation by Assessment, Sec. 416, it is said:

> "The fact that the public corporation has borrowed money, as by issuing bonds, and thus paid for the cost

> of such improvement, does not prevent the subsequent levy of an assessment against the property benefited by such improvement to reimburse the city."

In Ricketts vs. Hyde Park, 85 Ill. 110, head note 3, it is said:

> "Corporate authorities may levy special assessment for work already done in good faith by them, or under their direction, in anticipation of such assessment. This case distinguishes from Pease vs. Chicago, 21 Ill. 500, and Peck vs. Chicago, 22 Ill. 578, in which an assessment was sought to be made for work done by private persons on their own account and for which the city was under no obligation to make compensation."

In Howell vs. Buffalo, 37 N. Y. 274, the Court declared that a new assessment where a previous one had been held void was legal and valid, BECAUSE—

> "It is precisely what might have been done if there had been no previous attempt on the part of the city to collect the expense of improvements out of the property benefited."

Quoted and approved In the Matter of Van Antwerp, 56 N. Y. 266.

In the Matter of Lands in Flatbush, 60 N. Y. 398, Prospect Park in Brooklyn had been acquired, assessments had been levied upon property in Brooklyn and paid, and the balance of the cost had been provided for by bonds issued by the City of Brooklyn. Afterward the city tried to tax lands in Flatbush outside of Brooklyn to help pay those bonds, and the *sole question involved was one of construction of the Acts of the Legislature; whether the Acts gave the city the power to tax* lands outside of its limits for local improvement.

The Court say, 60 N. Y. 400, 401:

> "This case involves the construction to be placed upon the several Acts of the Legislature, relating to the selection and establishment of Prospect Park in the City of Brooklyn, and the question to be determined is, whether either or any of said Acts authorized any assessment to be made of any portion of the expense of acquiring title to and constructing said park upon lands situate in the town of Flatbush, which joins said city, and from the boundaries of which towns the portion of the lands for said park was taken and constituted a part of the territorial limits of the City of Brooklyn."

The Court did not modify the previous decisions; on the contrary, the Matter of Van Antwerp, 56 N. Y. 261, was expressly referred to with approval. (See page 40.) It is clear therefore, upon authority, that a tax can be levied on account of benefit received from a public improvement, where no attempt to levy the tax was made at the time the improvement was authorized.

But counsel urged, and the Court below so held, that when the City Council have passed an ordinance for paving a street it determines whether to pave it at the public expense or at the expense, in whole or in part, of the abutting property; and that if it once determined to pave it at the public expense, not only the *City,* but the *Legislature* is thereafter forever estopped and concluded from saying that the improvement thus made at the public expense is a benefit to the abutting property for which it may be called upon to pay this tax.

This Court completely answers this contention by saying that making an improvement at the public expense was

> "not a contract with the landowner, and no more prevented a special assessment being authorized for it later than silence of the laws at the same time as to how it should be paid for would have."
>
> Seattle vs. Kelleher, 195 U. S. 359.

In Joesting vs. Baltimore, 97 Md. 589, the contention was made that the provisions of the Act of 1888 as to taxation of real estate in the Annex, became a contract between the City and the taxpayers of the Annex especially as it had been submitted to the voters of the Annex; and therefore could not be changed by the Act of 1902, Chapter 130; but the Court held that the provisions of the Act of 1888 merely granted to the City a portion of the sovereign power of the State to levy taxes and that the Legislature could thereafter withdraw or modify that power at pleasure, and that the provisions of the Act of 1888 did not constitute a contract. (See the discussion, 97 Md. 592 and 593.)

Surely, therefore, the mere fact that the *City* by ordinance has *omitted,* when paving a street with improved paving, to exercise the taxing power by making an assessment on the abutting property owner, *does not constitute a contract with such property owner that they shall be thereafter exempted from any special tax* for that benefit binding upon the Legislature.

To this effect, see also—

Gray on Limitation of Taxing Power, sec. 1035.

Re-assessment statutes, as they are called—that is, statutes authorizing a valid assessment where a previous attempt to assess proved void—do *not derive their validity from the fact that a previous abortive attempt to assess had been made;* on the contrary they are sustained on the ground *that the Legislature may tax for an improvement conferring a benefit in the past, and having such power, the previous invalid attempt to assess does not prevent a subsequent valid assessment.*

This Court say—195 U. S. 359:

> "The principles of taxation are not those of contract. A special assessment may be levied upon an executed consideration, that is to say, for a public work already done. * * * *If this were not so it might be hard to justify re-assessments.*"

The following authorities show that the *Legislature may* levy a special tax on account of an improvement *previously made and paid for out of a loan or the general levy*:

Jelliff vs. Newark, 48 N. J. L. 101;
O'Mara's Appeal, 194 Pa. St. 86;
Prince vs. Boston, 111 Mass. 226, 231;
Davis vs. Newark, 54 N. J. L. 146-7;
In the Matter of Roberts, 81 N. Y. 62.

In Matter of Sachett, Douglass and DeGraw streets, the Court of Appeals say (74 N. Y. 106):

> "The *Legislature* can adopt and sanction an improvement or an expenditure which it could previously authorize. *It may authorize an assessment for an improvement, either before or after the improvement is made,* as in its judgment is deemed best."

Butler vs. Toledo, 5 Ohio St. 225;
Zahn vs. Rutherford, 72 N. J. L. 446;
Alcorn vs. Hamer, 38 Miss. 653.

See—

7th head note, page 653, and Opinion, page 760,
Cleveland vs. Tripp, 13 R. I. 50.

In this case the statute levied an assessment of 60 *cents per front foot on property abutting on "any street or highway in which any sewer has been or may be constructed."* (See head note, page 50.)

Objection was made that the statute was void because it fixed the charge without notice, but the Court said this objection was not good (page 64).

As to the objection that the tax applied to property abutting on streets in which sewers had been *previously* made, the Court say (13 R. I. 64-65):

> "Finally, the complainants contend that the assessment here is void because the statute under which it was

made was passed after the sewer, to pay for which it was made, had been constructed. The statute which was applicable when the sewer was constructed differed materially from the present in its methods and results. The present statute is, therefore, retrospective in its operation, and the question is, whether it is not unconstitutional on that ground. We do not think it is. Our Constitution does not inhibit retrospective legislation simply because it is retrospective; and it has been held that, in the absence of such an inhibition, a statute authorizing an assessment to pay for a local improvement previously made, on the estates specially benefited, is valid. Howell vs. City of Buffalo, 37 N. Y. 267; Matter of Van Antwerp, 1 N. Y. Supreme Ct. 423; Butler vs. City of Toledo, 5 Ohio, 225. The statute here is the less objectionable, because it was not designed for an isolated case, but creates a system for the whole city."

(The Maryland Constitution prohibits retrospective legislation only as to *crimes*. Declaration of Rights, Art. 17.)

In Hall vs. Street Commrs., 177 Mass. 439-40, the Court, through Holmes, C. J., say:

"Again, *it is not unconstitutional to levy special assessments for sewers already built.* One must not let one's mind be led astray by the false analogy of executed consideration in contracts. Public works must be paid for although they have been constructed before any tax has been levied on their account. If the tax otherwise is levied properly as a special assessment for betterments, then, in view of the fact that the benefit and payment both are compulsory, not matter of contract, *a betterment already executed when the law authorizing the tax was passed will sustain the tax as well as a work built with express notice that it is under the law.* Butler vs. Toledo, 5 Ohio St. 225; Howell vs. Buffalo, 37 N. Y. 267, 273."

The assessment in the Ulman case was not sustained as a *curative* proceeding; it was not a ratification or validation

of the former invalid assessment; if so it would have been void as an exercise of judicial powers, under Baltimore vs. Horn, 26 Md. 206. *Horn's case was distinguished by the Court of Appeals on the ground that the assessment before the Court was a new assessment.* The Court says (79 Md. 483):

> "The Act of 1892 provides for the collection of an assessment to be made to the extent that the property was specially benefited—*not the original assessment, but a new one,* and not necessarily the same amount, for it might have been very different if the appellee had seen fit to appear before the commissioner or submit her case to a jury."

In reason it would seem that whether or not a special tax is justified ought to be dependent on the *fact* of the existence of a benefit to the abutting property from the improvement made at the public expense.

If this be the true rule, then the special paving tax provided by the Act of 1912 is fully justified.

Counsel will not deny that the property abutting on any street paved with improved paving *is benefited by the existence of such paving* on the adjoining street; *is enhanced in value by the existence of such paving;* nor will anyone seriously deny that such property is benefited by the existence of improved paving on the adjoining street *more than the amount of the special tax* laid by the Act of 1912.

No one will deny that EACH *of the two-story houses belonging to the original plaintiff in this case, on which the entire tax for ten years is only* $18.00, IS BENEFITED; IS INCREASED IN VALUE, BY THE EXISTENCE OF THAT IMPROVED PAVING *much more than* $18.00; *that the difference between the value of that house abutting on that vitrified brick paving and what its value would be if that street was paved with cobble, is far more than* $18.00.

It is to be observed also that it is the *present existence of the improved pavement* that lends the additional value to the abutting property, *not the laying of the pavements.* If we may suppose a street to be paved with wooden blocks, and that, one week after the paving is completed, a conflagration comes and burns up the pavement, the abutting property would not be benefited one cent by that paving having been done. But if the improved paving is *on the street now no matter if it was laid ten years ago, the property is now benefited* and enhanced in value by the existence of such paving. As was said by this Court, 195 U. S. 359:

> "At the end the benefit was there, on the ground, at the city's expense."

If, therefore, the justification of a special tax is the fact that the abutting property is benefited by the paving, then the special tax imposed by the Act of 1912 is justified.

Legislative Declaration.

On the contrary, if the existence of a benefit to the abutting property is to be determined not by the *fact* but by the *legislative declaration,* then the special paving tax imposed by the Act of 1912 is beyond successful assault because that Act explicitly declares (Section 2, page 1073):

> "That for the purposes of this Act all landed property in Baltimore City adjoining or abutting upon any public highway, which has been or shall hereafter be paved with improved paving without special assessment of any part of the cost upon the abutting or adjoining property owners * * * is hereby declared to be specially benefited by such improved paving to an extent greater than the entire amount of the special tax hereby levied thereon."

Distinction Between the Power of the Legislature, and the Power of the City.

The distinction between what a *City* may do by *ordinance*, and what the *Legislature itself may do*, is clearly pointed out by the Court of Appeals in Hyattsville vs. Smith, 105 Md. 325 and 326, as follows:

> "The facts of the cases of Mayor vs. Moore, 6 H. & J. 375; Burns vs. Mayor, etc., 48 Md. 198; Mayor vs. Hanson, 61 Md. 462, upon which the appellees mainly rely to sustain the order of the lower Court, are wholly dissimilar to the facts in this case. No question of the constitutionality of an Act of Assembly was presented in either of those cases. The questions before the Court in all of those cases related to the validity of certain ordinances of the Mayor and City Council of Baltimore authorizing the paving of streets."

This distinction is also clearly stated by this Court in Parsons vs. District, 170 U. S. 51 and 52:

> "There is a wide difference between a tax or assessment prescribed by a legislative body, having full authority over the subject, and one imposed by a municipay corporation, acting under a limited and delegated authority. And the difference is still wider between a legislative Act making an assessment, and the action of mere functionaries, whose authority is derived from municipal ordinances."

No *legislative* intent against charging the abutting owner can be predicated upon the *mere omission of the City Council* to exercise the power given it by the Legislature.

A legislative intent declared by the Legislature can be changed by the next Legislature.

The legislative intent in reference to taxation in the Annex has been changed twice.

If a man has a just grievance against the Paving Tax Act because he bought his property at a time when there

was no law imposing a paving tax on it, what would your Honors say to the complaint of persons who in 1907 bought property in the Annex, which, as the law then existed, was subject to only 60 cents.—against the Act of 1908, which raised the taxes on their property to $1.30?

Millions of dollars have been invested in church property in this City under a law exempting such property from all general taxation, and in the expectation that such exemption will continue; but can anyone doubt the power of the Legislature to repeal that exemption?

The same may be said of manufacturing plants.

Is it not true that everyone who buys property is *legally charged with notice of the power of the Legislature to increase taxes, or to lay new taxes, either general or special?*

It may be that property once assessed for a part of the cost of a street paving could not again be taxed for the same improvement; that it might be considered two successive taxes for one benefit, and therefore double taxation. But where the property has never paid anything (except the general taxes paid by other property not so benefited) the special tax is not a double tax.

25 Enc. of Law, 2nd Ed. 1174-5.

(*a*)

The authorities cited by counsel for plaintiff in error in support of this contention, so far as relevant, relate *not to the power of the Legislature, but to the power of the City*, and are *based upon a lack of legislative authority to the City.*

To say that a *city* cannot levy an assessment after the work is done, *because the Legislature has not given it power to do so*, and to say that the *Legislature can* levy such an assessment, are perfectly consistent. And for the all-sufficient reason that *a city has no taxing power*, except so far as given by the Legislature; whereas the *Legislature has unlimited taxing power*, except as restrained by the Constitution.

The City of Baltimore could not levy a paving tax for a past improvement, except as a sequel to an abortive assessment, *not because there is anything inherently wrong in such a tax, but because the Legislature has not given the City the power to levy such a tax.*

City Code, 1906, page 77.

But it does not follow that the Legislature cannot levy such a tax. The quotation from 25 Encyc. 1176, in terms, is *confined to the power of the municipality.* The very next sentence begins (page 1177):

> "It has been held that the Legislature may sanction and adopt a municipal local improvement which it could have previously authorized and may authorize the levy of special assessments to pay therefor * * *."

The quotation from 28 Cyc. 1107 deals only with the *power of the City.* Indeed, the same page says that the Legislature can authorize the City to purchase a sewer previously constructed by private parties and assess the abutting owners for the cost thereof.

(E)

Counsel for Plaintiffs in Error make the contention in their brief, page 40, that—

> "The Act is void on the ground that it imposes a double tax, in part at least, for the same benefit."

Counsel then quote from Norwood vs. Baker, and from Maryland Trust Company vs. Baltimore, 93 Atl. Rep. 454. Both of these cases related to the opening of streets.

Norwood vs. Baker is discussed above.

Maryland Trust Company vs. Baltimore simply declared the generally accepted doctrine that the benefits levied for

the opening of a street cannot exceed the entire cost of the improvement, otherwise the abutting owners would be paying the excess into the general treasury of the City. The tax levied by the Act assailed in this case is far less than the cost of the paving. This case comes up on demurrer to a bill. There is no allegation in the bill that the tax exceeds, or even equals, the cost of the improvement. Neither of these cases has any bearing on the point now being discussed.

The argument is made that if the property abutting on an improved street paid out of a loan or general levy helps in the general tax rate to pay the loan or raise the general fund, a special tax or assessment subsequently is a second tax for the same benefit.

This argument is unsound. If the property abutting on a vitrified brick pavement has only paid the general tax rate imposed on all property, *it has not contributed anything more to the cost of the pavement upon which it abuts than property abutting upon cobble stone streets*, it has simply paid the same as other property, not enjoying such special benefit, to the general fund for the support of the government, and has paid nothing for the special benefit. The fact that it helps to pay in the general levy the interest and sinking fund on the loan furnishes no ground for the objection to a special assessment.

1 Page and Jones on Assessment, sec. 416.

Not only is the special paving tax under the Act of 1912 not a second tax because it applies only to property abutting on streets paved with improved paving without special assessment on the abutting property; but the authorities hold that *two successive taxes for one benefit are not illegal.*

In 4th Dillon on Municipal Corporations, 5th Ed., sec. 1469, the text reads:

> "The original assessment for a local improvement proving insufficient, the Legislature may, in the absence of special constitutional restrictions, authorize a reassessment and make it operate upon the property benefited, that is, upon all that was originally liable to contribute; and such a law is valid, even against a person purchasing intermediate the assessment and reassessment. Vested rights are not thereby impaired."

A second assessment was levied and approved in Butler vs. Toledo, 5 Ohio St. 231-2, and Earl vs. Morrillton, 70 Ark. 211.

(F)

OBJECTION THAT YOU CANNOT LEVY AN ASSESSMENT ON PROPERTY THE OWNERSHIP OF WHICH HAS CHANGED BETWEEN THE TIME WHEN THE IMPROVEMENTS ARE MADE AND THE TIME WHEN THE TAX OR ASSESSMENT IS LEVIED.

This question was also left open by the Court of Appeals in the case of Baltimore vs. Ulman, 79 Md. 469, because the property had not changed hands in that case and it was not necessary to decide the question. The Court say (79 Md. 480):

> "It is not necessary to discuss how far such a law could affect property that had been *bona fide* transferred from the owner of the property at the time the work was done to some one who had no notice that the property was liable to such a claim, as in this case the title remained in the person whose property is alleged to have been specially benefited."

But the question has been set at rest by this Court, which decided that every purchaser of property buys knowing that the Legislature has full power to tax that property at any time in the future; that the Legislature has the same power to levy a special tax as a general tax, and the pur-

chaser can no more say that a subsequent special tax is void, than he could say that a subsequent increase in the general tax was void.

Seattle vs. Kelleher, 195 U. S. 360.

On this point the Court of Appeals of Maryland, in the opinion in this case, say (Record, p. 49):

> "The Supreme Court, in Seattle vs. Kelleher, *supra*, also held, that the doctrine concerning *bona fide* purchasers for value did not apply to a tax of this character. A man cannot get rid of his liability to a tax by buying without notice.
>
> Tallman vs. Janesville, 17 Wis. 71;
> Cooley on Taxation, 3rd Ed. 527;
> Leominster vs. Conant, 139 Mass. 384;
> Parsons vs. Dist., 170 U. S. 57;
> Chester vs. Pennell, 169 Pa. St. 300;
> Butler vs. Toledo, 5 Ohio St. 231."

(G)

The contention made in the Brief of the Plaintiff in Error, that the Act is void because it levies a tax according to the front-foot rule, is answered by repeated decisions of this Court and the overwhelming weight of authorities in the various States.

Heavner vs. Elkins, 231 U. S. 743;
Schafer vs. Werling, 188 U. S. 516;
Detroit vs. Parker, 181 U. S. 399;
Chicago vs. Janesville, 28 L. R. A., New Series, 1124 and notes, and 1161 and ntoes.

The counsel for the Plaintiff in Error quote an extract from the Ulman case, in 72 Md. 594, in the support of their contention, that the tax is void because levied by the front-

foot rule. But the validity of the legislative proportionment by the front-foot rule is settled by repeated decisions of the Court of Appeals in later cases.

City vs. Stewart, 92 Md. 535;
Hyattsville vs. Smith, 105 Md. 318;
Bassett vs. Ocean City, 118 Md. 114; see page 123, and the decision of the Court in this case.
See Record, page 29, and following.

The decision in the Stewart case (92 Md.) was written by the same Judge who wrote the decision in the Ulman case (72 Md.), and what was said in the Ulman case is distinguished in City vs. Stewart, 92 Md. 552.

(H)

Counsel for plaintiff in error argue at some length, in their brief, that the Act is void because it does not give the owner of property abutting on a street, paved with improved paving, an opportunity to be heard upon the question whether or not improved paving is a benefit to the abutting property. (See their Brief, pp. 31-37.)

This is completely answered by the quotation from Spencer vs. Merchant, 125 U. S. in the Supplemental Brief of counsel for plaintiff in error, on page 48, as follows:

> "But the Legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not; but only upon the *validity of the assessment*, and its *apportionment, among the different parcels of the class* which the Legislature has conclusively determined to be benefited."

In Bassett vs. Ocean City, which involved an assessment for the expense of a boardwalk levied upon the front-foot rule, the Court of Appeals of Maryland say (118 Md. 120):

> "There may, of course, be exceptions to the general rule as stated by Judge Cooley, but where, as in this case, the improvement is one that may specially benefit the property upon which the assessments are made, the legislative determination of the question of benefits should be regarded as conclusive. See cases collected in Note VIII on pages 1158-1160, 28 L. R. A. (N. S.); Cooley on Tax. 1174."

No one will deny that abutting property may be benefited by an improved paving of the street upon which it fronts. The fact is, that everybody knows that it is benefited.

The Legislature has declared, in this Act, that it is benefited and has itself made the apportionment of the benefit and specified the amount on each abutting property. Wherever the Legislature commits the assessment or apportionment to a commission or subordinate body, notice, or an opportunity to be heard, is necessary, but no notice or opportunity to be heard is necessary where the Legislature directly levies the tax.

Parsons vs. Dist., 170 U. S. 54;
Hagar vs. Reclamation Dist., 111 U. S. 701; and
other cases, *supra*.

Respectfully submitted,

S. S. FIELD, *City Solicitor,*
For Defendants in Error.

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 294.

PHILLIP WAGNER, INCORPORATED,
Plaintiff in Error,

VERSUS

OSCAR LESER, A. B. CUNNINGHAM AND JOHN GILL, JR., JUDGES OF THE APPEAL TAX COURT OF BALTIMORE CITY, AND JACOB W. HOOK, TAX COLLECTOR OF BALTIMORE CITY,
Defendants in Error.

Motion to Dismiss Writ of Error or to Affirm the Judgement Below.

To the Honorable the Supreme Court of the United States, Honorable Edward D. White, Chief Justice:

And now come Oscar Leser, A. B. Cunningham and John Gill, Jr., Judges of Appeal Tax Court of Baltimore City, and Jacob W. Hook, Tax Collector of Baltimore City,

Defendants in Error, by their counsel appearing in their behalf, and move the Court:

1. To dismiss the Writ of Error herein, on the ground that this Court is without jurisdiction over the cause sought to be reviewed by said Writ of Error.

2. To affirm the judgment or decree of the Court of Appeals of Maryland, sought to be reviewed by the Writ of Error herein, on the ground that the ruling, decision and judgment or decree of said Court of Appeals is obviously correct; that it is manifest that said Writ of Error was taken for delay only; that the questions on which the decision of the said cause depends are so frivolous as not to need further argument.

S. S. FIELD,
City Solicitor of Baltimore,

ALEXANDER PRESTON,
Deputy City Solicitor,

Counsel for Defendants in Error.

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 294.

PHILLIP WAGNER, INCORPORATED,
Plaintiff in Error,

VERSUS

OSCAR LESER, A. B. CUNNINGHAM AND JOHN GILL, JR., JUDGES OF THE APPEAL TAX COURT OF BALTIMORE CITY, AND JACOB W. HOOK, TAX COLLECTOR OF BALTIMORE CITY,
Defendants in Error.

Messrs. George Washington Williams and John Holt Richardson, Attorneys for Plaintiff in Error:

Take Notice: That the Defendants in Error will, on Monday, the third day of May, 1915, at 12 o'clock noon, or as soon thereafter as counsel can be heard, at the Supreme Court Room, in the City of Washington, District of Columbia, move this Court on the Record herein:

1. To dismiss the Writ of Error herein, on the ground that this Court is without jurisdiction over the cause sought to be reviewed by said Writ of Error.

2. To affirm the judgment or decree of the Court of Appeals of Maryland, sought to be reviewed by the Writ of Error herein, on the ground that the ruling, decision and judgment or decree of said Court of Appeals is obviously correct; that it is manifest that said Writ of Error was taken for delay only; that the questions on which the decision of the said cause depends are so frivolous as not to need further argument.

Together with this Motion, the Defendants in Error serve upon said Plaintiff in Error a copy of their Brief to be filed in support of the said Motion.

S. S. FIELD,
City Solicitor of Baltimore,

ALEXANDER PRESTON,
Deputy City Solicitor,

Counsel for Defendants in Error.

Service of the above notice and of the Brief therein referred to, admitted this.....day of April, 1915.

.....

.....
Attorneys for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 294.

PHILIP WAGNER, INCORPORATED,
Plaintiff in Error,

VERSUS

OSCAR LESER, A. B. CUNNINGHAM AND JOHN GILL, JR., JUDGES OF THE APPEAL TAX COURT OF BALTIMORE CITY, AND JACOB W. HOOK, TAX COLLECTOR OF BALTIMORE CITY,
Defendants in Error.

Brief in Support of the Motion to Dismiss or Affirm.

This proceeding originated in a Bill in Equity filed in the Circuit Court of Baltimore City, by Phillip Wagner, Incorporated, the owner of certain real estate in Baltimore City, against the Judges of the Appeal Tax Court and the City Collector of Baltimore City.

The object of the Bill was to have declared void the Act of the Maryland Legislature of 1912, Chapter 688, said Act being quoted in full in the Bill and forming the second paragraph of the Bill. (Record, pages 2 to 4.)

This Act was in a sense supplementary to a prior Act passed in 1906. By the Act of 1906, Chapter 401, Baltimore City was authorized to float a loan of Five Millions of Dollars for the purpose of improved paving in Baltimore City; Baltimore City up to that time having been paved almost entirely with cobble stones. It soon became apparent that five millions of dollars would not be more than half enough to repave the entire city. To supplement this fund of five millions and provide a sufficient fund for the repaving of the entire city, was the purpose of the Act of 1912, Chapter 688, assailed in these proceedings.

Provisions of Act.

The Act provided that all owners of real estate in Baltimore City abutting upon any street paved with improved paving (except where part of the cost of the paving had been assessed upon abutting property) should pay a special paving tax for each year, for ten years, the amount of the tax varying with the width of the street,—being fifteen cents per front foot on property abutting upon streets thirty feet wide, or more, ten cents per front foot on property abutting upon streets more than fifteen feet and less than thirty feet wide, and five cents per front foot upon property abutting upon streets less than fifteen feet wide.

Thus the Act classified real estate in Baltimore City which was enjoying the benefit of abutting upon improved paving and subjected all such property to this special tax. The tax was a very small one. Upon the houses belonging to the Plaintiff in Error, which are fifteen feet front, upon a street more than thirty feet wide, improved with vitrified brick

paving, the tax amounts to $2.25 per year, or for the whole ten years to only $22.50; as the total charge for the benefit of abutting upon an improved pavement.

In order to make the tax a fair and equitable one, the Act applied in terms to every owner of property in Baltimore City then enjoying the advantage of abutting upon an improved pavement, as well as every owner who should thereafter enjoy that advantage. In other words, it applied not only to property abutting on streets thereafter to be paved, but also on property abutting on streets which had already been paved, provided, at the time the Act was passed, the property answered the description of being property, at that time enjoying the advantage of abutting upon a street paved with improved paving.

The validity of this Act was assailed on the ground of "being in conflict with the Fifth and Fourteenth Articles of the Amendments to the Constitution of the United States, as well as being in conflict with the Fifteenth Article of the Maryland Bill of Rights." (Fifth paragraph of the Bill, Record, page 5.)

The suit was brought against the Judges of the Appeal Tax Court and the Collector of Taxes, the former being made defendants because the Act required them to classify the various properties in Baltimore City, subject to the tax, for the purpose of ascertaining which should pay the fifteen cents, which the ten cents and which the five cents rate. After being so classified, the Collector of Taxes is required to collect this special tax.

The Bill asked for an injunction to prevent the Appeal Tax Court from classifying the plaintiff's property and the Collector from collecting the special tax imposed by this Act, from the plaintiff.

Objection Raised to the Act.

The only objection specified in the Bill to the validity of the Act was that specified in Paragraph Five and repeated in Paragraph Six, that the Act was null and void "as being in conflict with the Fifth and Fourteenth Articles of the Amendments to the Constitution of the United States, as well as being in conflict with the Fifteenth Article of the Maryland Bill of Rights." (Record, page 5.)

The Circuit Court of Baltimore City sustained the contention that the Act was in conflict with the Fifteenth Article of the Bill of Rights of Maryland, being the Article which requires taxes to be levied *ad valorem*, but the Court of Appeals held that this was not a tax within the meaning of that Article, but was a special assessment on account of benefits received by a public improvement, made with public funds. The Court of Appeals also held that the Act did not violate any provision of the Federal Constitution and was valid. The contention that the Act violates the Fifth Amendment to the Constitution of the United States is untenable, because the Fifth Amendment is a limitation on the power of Congress and not upon the power of a State.

Barron vs. Baltimore, 7 Peters, 242.

In the original Bill there is no specification as to how the Act violates the Fourteenth Amendment to the Constitution of the United States, and the case having been disposed of upon Bill and Demurrer, there is no such specification, until we come to the Assignment of Errors. (Record, pages 36 to 39.)

There are nineteen Assignments of Errors. The first, second and third merely allege generally error in dismissing the Bill and holding the Statute invalid. The fourth and fifth assail the Statute as void, because the Act of the Legislature levies the tax without previous notice or opportunity to be heard. The sixth, seventh, eighth and ninth

allege that the Statute is invalid, because the tax is levied according to the front foot rule. The tenth, eleventh, twelfth and thirteenth set up the objection that the Act applies to property abutting on streets improved before the passage of the Act. The fourteenth raises the objection that it applies to property which may have changed hands between the time of the paving and the time of the passage of the Act. The fifteenth, sixteenth and nineteenth raise the objection that the proceeds of the tax are not spent on the street in front of the property taxed, but go into a general fund, to be used for improved paving. The seventeenth and eighteenth make the mere general allegation that the tax is arbitrary and oppressive.

All These Objections Settled by Decisions of This Court.

That the Legislature may directly levy a tax or special assessment, without previous notice, or giving the parties taxed an opportunity for a hearing, is no longer an open question.

Heavner vs. Elkins, 231 U. S. 743;
Parsons vs. District, 170 U. S. 54.

When Notice Necessary.

Where the amount of the tax is left to be fixed by commissioners, notice and an opportunity to be heard must be given; *but where the Legislature itself fixes the amount of the tax, no notice is necessary.*

Hagar vs. Reclamation Dist., 111 U. S. 701;
Spencer vs. Merchant, 125 U. S. 356;
Parsons vs. District, 170 U. S. 50-56;
Wight vs. Davidson, 181 U. S. 380-383;
Chicago vs. Janesville, 28 L. R. A. 1132-3.

That a Statute levying a special assessment, by the front foot rule, does not violate the Fourteenth Amendment, is equally well settled.

Heavner vs. Elkins, 231 U. S. 743;
Schaefer vs. Werling, 188 U. S. 516;
Detroit vs. Parker, 181 U. S. 399.

That an assessment, on account of a benefit already received in the shape of a pavement previously laid, raises no question of violation of the Federal Constitution, is also settled.

Gray on Lim. of Tax. Power, sections 1828 and 2003;
Seattle vs. Kelleher, 195 U. S. 351.

And the same case decides the fact that the property may have changed hands between the time of the paving of the street and the time when the assessment or tax is levied, raises no question of conflict with the Fourteenth Amendment.

195 U. S. 359;
28 L. R. A. (New Series) 1169;
Spencer vs. Merchant, 125 U. S. 346.

On this point the Court of Appeals of Maryland in this case say (Record, page 33):

> "In the City of Seattle vs. Kelleher, 195 U. S. 351, the Supreme Court held that the Legislature had the power to levy a special assessment on account of an improvement previously made, where at the time of the improvement an assessment had not been made. Mr. Justice Holmes, in delivering the opinion of the Court said: 'At the end, the benefit was there, on the ground, at the city's expense. The principles of taxation are not those of contract. A special assessment may be levied upon an executed consideration—that is to say, for a public work already done. If this were not so it might be hard to justify re-assessments. The

same answer is sufficient if it be true that when the work was done the cost of planking could not be included in the special assessment. The charge of planking on the general taxes was not a contract with the landowners, and no more prevented a special assessment being authorized for it later than silence of the laws at the same time as to how it should be paid for would have. In either case the Legislature could do as it thought best.' Bellows vs. Weeks, 41 Vermont, 590, 599, 600; Mills vs. Charleton, 29 Wisconsin, 400, 413; Hall vs. Street Commissioners, 177 Mass. 434, 439; Norwood vs. Baker, 172 U. S. 269, 293; Williams vs. Supervisors of Albany, 122 U. S. 154; Frederick vs. Seattle, 13 Wash. 428; Cline vs. Seattle, 13 Wash. 444; Bacon vs. Seattle, 15 Wash. 701; Cooley, Taxation, 3rd Ed. 1280. The Supreme Court, in Seattle vs. Kelleher, *supra*, also held, that the doctrine concerning *bona fide* purchasers for value did not apply to a tax of this character. A man cannot get rid of his liability to a tax by buying without notice. Tallman vs. Janesville, 17 Wis. 71; Cooley on Taxation, 3rd Ed. 527; Leominster vs. Conant, 139 Mass. 384; Parsons vs. Dist. 170 U. S. 57; Chester vs. Pennell, 169 Pa. St. 300; Butler vs. Toledo, 5 Ohio St. 231."

Federal Questions Not Properly Raised.

This case originated in the Circuit Court of Baltimore City, and was decided by that Court in favor of the Plaintiff in Error (plaintiff in that Court) on the ground that the Statute in question was contrary to the Maryland Declaration of Rights.

No Federal question was passed on by that Court. (See its opinion, Record, page 26, 27.)

In the Bill itself, the only attempt to raise any Federal question is in the allegation that the Act of the Maryland Legislature was "in conflict with the Fifth and Fourteenth Articles of the Amendments to the Constitution of the

United States as well as being in conflict with the Fifteenth Article of the Maryland Bill of Rights."

This mere general allegation is not sufficient to raise a Federal question.

Capital City Dairy Co. vs. Ohio, 183 U. S. 238-248;
Boilen vs. Nebraska, 176 U. S. 83;
Chapin vs. Fye, 179 U. S. 128;
Hulburt vs. Chicago, 202 U. S. 275.

Respectfully,

S. S. FIELD,
ALEXANDER PRESTON,
For Defts. in Error.

PHILLIP WAGNER, INCORPORATED, *v.* LESER ET AL., JUDGES AND TAX COLLECTOR OF BALTIMORE CITY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

No. 28. Argued October 25, 26, 1915.—Decided November 29, 1915.

The Fourteenth Amendment does not interfere with the discretionary power of the States to raise necessary revenues by imposing taxes and assessments within their jurisdiction; nor are general taxing systems to be presumed to be lacking in due process of law because of inequalities or objections so long as arbitrary action is avoided.

A State may, without violating the Fourteenth Amendment, exercise its authority to assess property on account of special benefit resulting from an improvement already made.

An assessment for improvements already made and paid for, is not an unconstitutional deprivation of property without due process of law because the amount when paid is to be used for other public purposes to which public funds are properly applicable.

Where the classification of property to be improved and the assessment are fixed by the statute itself and a specified sum fixed ratably

according to area of the property, notice and hearing as to amount and extent of benefits are not required, in the absence of abuse of power, in order to render such legislative action due process of law within the meaning of the Federal Constitution. *Spencer* v. *Merchant*, 125 U. S. 345.

While constitutional protection against deprivation of property without due process of law is available to persons deprived of private rights by arbitrary state action, whether by legislative authority or otherwise, no such deprivation exists where, as in this case, there is no proof of disproportion between the assessment made and the benefit conferred showing arbitrary legislative action.

The Maryland Statutes of 1906 and 1908 providing for imposition of a special tax on property in Baltimore at a specified rate per square foot for a specified number of years for paving the streets of that city *held* not to be arbitrary and unconstitutional as depriving the owners of their property without due process of law.

120 Maryland, 671, affirmed.

THE facts, which involve the constitutionality of a statute of Maryland and a tax levy thereunder on property in Baltimore for improving the paving of streets in that city, are stated in the opinion.

Mr. Geo. Washington Williams and *Mr. Charles J. Bonaparte*, with whom *Mr. John Holt Richardson* was on the brief, for plaintiff in error:

A legislature cannot bind parties interested by a recital of facts, or prescribed conclusive rules of evidence, for either of these would be only an indirect method of disposing of controversies. Cooley, Const. Law, 46.

Due process of law is not confined to judicial proceedings. The article of the Constitution is a restraint on the legislative as well as on the executive and judicial powers of the Government. *Murray* v. *Hoboken Land Co.*, 18 How. 272; *Ulman* v. *Baltimore*, 72 Maryland, 592; *Norwood* v. *Baker*, 172 U. S. 278; *State* v. *Newark*, 37 N. J. L. 415, 423; *Thomas* v. *Gain*, 35 Michigan, 155, 162; *Tidewater Co.* v. *Coster*, 18 N. J. Eq. (3 C. E. Green) 519; *Stuart* v. *Palmer*, 74 N. Y. 183.

There is great dissimilarity between an assessment or tax for general purposes and an assessment for special benefits. Dillon on Mun. Corp., § 761.

The act is invalid because the proceeds derived from the assessment were expressly designed to be applied to the improvement of streets other than those which had been assessed specially, and, therefore, the said assessment is not made to pay for improvements specially benefiting the property thereby assessed.

The act disturbs vested rights, to-wit: By imposing a tax or special assessment upon property for special benefits long since accrued to said property, which improvements had been paid for in whole or in part other than by special assessment upon the property abutting thereon. The act is retrospective in its operation, thereby disturbing the rights, which had accrued to and become fixed in property holders coming within its terms and provisions of said act. *Norwood* v. *Baker*, 172 U. S. 278.

The general law relative to taxation has always been held inapplicable to assessments. The general law requires all property to be assessed for the general purposes of Government according to its value and therefore, if a piece of property escapes the tax assessors it may later be assessed for such time as it has escaped taxation. That would imply carrying out an intention theretofore declared, and would not be retrospective in the legal conception of that term.

Where the municipality has discretion as to whether a local improvement shall be paid for by special assessment or by general taxation, it cannot, after the improvement had been made, levy special assessment therefor. 25 Am. & Eng. Enc. 1176; *Bennett* v. *Seibert*, 10 Inc. App. 380; *Spaulding* v. *Bates*, 25 Inc. App. 490; *Galveston R. R.* v. *Green*, 35 S. W. Rep. 819; *Holliday* v. *Atlanta*, 96 Georgia, 377–381; *Kelly* v. *Luning*, 76 California, 309; *Bennett* v. *Emmetsburg*, 115 N. W. Rep. 582–588; *Pease*

v. *Chicago*, 21 Illinois, 500; *Doutherty* v. *Chicago*, 53 Illinois, 79; *Market Street Case*, 49 California, 546; *Alford* v. *Dallas*, 35 S. W. Rep. 816; Cooley on Taxation, p. 1155; *Seattle* v. *Kelleher*, 195 U. S. 351.

Matter of Flatbush Lands does not apply, and see 60 N. Y. 398.

The front foot rule, when made applicable to the city as a whole, is arbitrary, inequitable, unjust and oppressive. *Ulman* v. *Baltimore*, 72 Maryland, 587; *Cass Farm Co.* v. *Detroit*, 181 U. S. 396; *Parker* v. *Detroit*, id. 399; *Zehnder* v. *The Barber Asphalt Co.*, 106 Fed. Rep. 107.

Special assessments upon property for the cost of public improvements are in violation of the Constitution, if they are in substantial excess of benefits received. *Sears* v. *Boston*, 173 Massachusetts, 550; *Weed* v. *Same*, 172 Massachusetts, 28; *Dexter* v. *Boston*, 176 Massachusetts, 247; *Hall* v. *Street Com.*, 177 Massachusetts, 434; *Lorden* v. *Coffey*, 178 Massachusetts, 489.

The act is illegal and void, because it arbitrarily imposes a fixed sum upon property holders as and for special benefits alleged to have been received, without giving an opportunity to the property holder to show as a matter of fact said property is not benefited to the extent to which it is declared by the act to be benefited, and is therefore a taking of property without due process of law. 8 Cyc. 1083, 1108; *Holden* v. *Hardy*, 169 U. S. 366; *Murray* v. *Hoboken Co.*, 18 How. 272; *Ulman* v. *Baltimore*, 72 Maryland, 587; *Clark* v. *Mitchell*, 69 Missouri, 627; *United States* v. *Cruikshank*, 92 U. S. 542; Cooley's Con. Lim. 503–505; *Columbia Bank Case*, 4 Wheat. 235; Am. & Eng. Encyc. 1173; *Maryland Trust Co.* v. *Baltimore*, 93 Atl. Rep. 454.

Notice should have been given even though the apportionment was made by the legislature; in view of the oppressiveness and arbitrariness of the rule established by the legislature, and its unjust and unequal operation

in this case, notice should have been required, and in its absence, the act should be held unconstitutional.

The act imposes upon the property coming within its terms, a special tax which was not contemplated by the authority which improved the various streets of Baltimore City, at the times of such improvement as a means of meeting the expense of the same.

The act covers all property coming within its terms, even though the statute or ordinance under which such improvements were made, declare that such improvements were made for the public benefit, and not for local advantage to the property abutting upon such improvements.

In this event the two acts would be conflicting and it would certainly be against public policy to adhere to the latter act. Property holders would never be secure in their holdings. An act of this character really amounts to an assessment upon one street for the benefit of another.

The act is void on the ground that it imposes a double tax, in part at least, for the same benefit. *State* v. *Newark*, 37 N. J. L. 415.

Mr. S. S. Field, with whom *Mr. Alexander Preston* was on the brief, for defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

Phillip Wagner, a corporation, filed its bill on behalf of itself and other taxpayers owning property in Baltimore City, adjoining or abutting upon a public highway which has been paved with improved paving without having been assessed for any part of the cost thereof, and who are similarly situated with the complainant, who is the owner of certain real estate, improved by seven two-story dwelling houses, situated on Philadelphia Road, a public highway within the limits of Baltimore